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IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GEFSKY, REICH AND REICH

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Petitioner, Michael M. Busic, prays that a Writ of Certiorari issue to review the Judgment on Rehearing of the United Staes Court of Appeals for the Third Circuit entered in this case on December 12, 1978 (Appendix "C").

Opinions Below

The Opinion and Order of the Trial Court (Appendix "A") is dated February 17, 1977 and, to the best of petitioner's knowledge, has not been printed by any official or unofficial reporter. The United States Court of Appeals for the Third Circuit filed an Opinion and Judgment on January 5, 1978 (Appendix "B"); and then on December 12, 1979, the United States Court of Appeals for the Third Circuit filed a Supplemental Opinion Sur Rehearing and Judgment (Appendix "C"). To the best of petitioner's knowledge, neither of the above Opinions of the Third Circuit Court of Appeals has been printed by any official or unofficial reporter.

Between the first and second Opinions filed by the Third Circuit, this Honorable Court decided the case of

Simpson, et al. v. United States, 435 U.S. 6, 55 L.Ed. 2770, 98 S.Ct. 909 (1978). Because Simpson addressed itself to the same question as the instant case, the Government petitioned for rehearing before the Lower Court, and after rehearing, the Lower Court again affirmed its original decision. Therefore, petitioner, Michael M. Busic, files this Petition.

Jurisdiction

The Supplemental Opinion Sur Rehearing and Judgment of the United States Court of Appeals for the Third Circuit was entered on December 12, 1978 (Appendix "C"). This Petition for Writ of Certiorari was filed within thirty days.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did Congress authorize the additional penalty of 18 U.S.C. §924(c) for commission of an assault on federal officers when the underlying violation with firearms was already subject to an enhanced penalty under 18 U.S.C. §111?

2. As a matter of Double Jeopardy, are the offenses of an assault on federal officers with firearms and the use or carrying of firearms for an assault on federal officers sufficiently distinguishable to permit the imposition of cumulative punishment?

Constitutional and Statutory Provisions Involved

1. The United States Constitution, Fifth Amendment

> "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C. §924(c)

> "(c) Whoever
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

3. 18 U.S.C. §111

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement of the Case

For simplicity, petitioner incorporates the summary of evidence contained in the Opinion of the United States Court of Appeals for the Third Circuit (Appendix "B"). Those portions of the Opinion discussing matters not material to the issues raised herein are omitted.

> "Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob 'front money' from an undercover agent. This attempted robbery culminated in a shootout with federal agents.
>
> * * *
>
> "Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples

of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30.) The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some 'front money'. A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

"As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

"Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment.

* * *

"The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having used (emphasis in the original) a firearm to commit the drug conspiracy and assaults on federal officers in violation of §924(c)(1); Busic for having carried (emphasis in the original) a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts -- all to run consecutively to each other -- for a total of 30 years for each defendant."

In the Supplemental Opinion Sur Rehearing, the Third Circuit rejected petition Busic's contention that, as a matter of

statutory construction, 18 U.S.C. §924(c) did not apply in those cases where the penalty for the underlying felony was already enhanced for use of a dangerous weapon. The Lower Court held that Simpson does not proscribe the imposition of consecutive sentences under 18 U.S.C. §111 and 18 U.S.C. §924(c)(2). The judgment of sentence as to petitioner Busic was affirmed (Appendix "C").

As to defendant La Rocca, the Third Circuit, on the basis of this Court's decision in Simpson, remanded for resentencing. On remand, the Government may elect to proceed under either 18 U.S.C. §924(c)(1) or 18 U.S.C. §111, but not both.

Argument

There are three separate reasons why this Court should grant a Writ of Certiorari and review petitioner's case. First, the Third Circuit misinterprets and misapplies Simpson v. United States, and petitioner is subjected to an additional penalty. * Secondly, Simpson may not have gone far enough to resolve conflicts between the Circuit Courts. There is still ambiguity concerning the overlap between 18 U.S.C. §924(c) and other criminal offenses. This ambiguity relates to whether an additional sentence can be imposed under 18 U.S.C. §924(c) after a defendant has already been convicted of an underlying felony which carries an enhanced penalty. This Court can clarify Simpson and provide uniformity. Finally, in Simpson, this Court left open an unresolved issue of great importance. Resolution of this Double Jeopardy issue is necessary, if petitioner is not entitled to relief on other grounds of statutory construction. Simpson

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* In Counts 17 and 18 of the indictment under §924(c), petitioner was charged with carrying a firearm in connection with assaults on federal officers and drug conspiracies. However, the trial judge charged the jury that they could convict on this charge if the firearm was carried in connection with either offense. The Opinions of the Third Circuit correctly note that it is impossible to determine whether or not the jury concluded that Busic carried a firearm in connection with both felonies. (Appendix "B", footnote 5; Appendix "C", page 2) For example, the drug conspiracies could have terminated by the time of the "shootout". Since the jury verdict could have been based on the conclusion that the firearm was carried in connection with the assaults alone, it is necessary to determine whether such a conviction and sentence under §924(c) can stand.

holds that where a defendant has been convicted of bank robbery with firearms under 18 U.S.C. §2113(d), which carries an enhanced penalty, and also convicted of using a firearm to commit a felony under 18 U.S.C. §924(c), such defendant may not be sentenced under both. The rationale of Simpson relied upon the legislative history and the language of the bill's sponsor, Representative Poff, as follows:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112 or 113, which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." 114 Cong. Rec. 22232 (1968).

The language states that 18 U.S.C. §924(c) is inapplicable to violations under statutes which already carry an enhanced penalty. Although Simpson involves a bank robbery under 18 U.S.C. §2113(d), the sponsor's language specifically includes assaults on federal officers under 18 U.S.C. §111.

The Supplemental Opinion Sur Rehearing of the Third Circuit (Appendix "C") creates an illogical and unreasonabl distinction of 18 U.S.C. §924(c), which could result in obvious inequities. The Third Circuit reaches a different result in co-defendant La Rocca's case and petitioner Busic's case. La Rocca's case is remanded for resentencing under §924(c) or §111, but not both; petitioner Busic's case is affirmed. The Lower Court reached this result by distinguishing between subsections §924(c)(1) and (2), the distinction between "carrying" and "using" a firearm. The cited language of Representative Poff speaks of the statute as a whole, not divided into subparagraphs. There is no rational basis for treating these two subsections separately, nor does it appear that this Court in Simpson intended such a distinction.

If permitted, the distinction would lead to an absurd and illogical result. "Users" may receive one sentence; "carriers" may receive consecutive sentences. This is the impact as to the co-defendant in the instant case. There is no dispute that the goal behind the law is to discourage the use of firearms; the interpretation of the Third Circuit imparts a decided lack of reason to Congress in its statutory scheme when a wholly logical alternative interpretation is available. Representative Poff said his substitute did not apply to specific violations; §924(c) is completely logical if interpreted as not to apply to such violations. Obviously, the Lower Court misinterpreted Simpson, and this Court should issue a Writ of Certiorari.

It is still necessary to resolve conflicts between the Circuit Courts either created or left unresolved by Simpson. The Simpson rationale appears similar but not identical to the Sixth Circuit's decision in United States v. Eagle, 539 F.2d 1166 (1976). In Eagle, defendant, an Indian, was convicted of assaulting another Indian on a reservation in violation of 18 U.S.C. §1153, which carried an enhanced penalty, and using a firearm to commit the underlying felony under 18 U.S.C. §924(c). The Eagle Court held defendant could not be sentenced or prosecuted for the §924(c) violation. In several places, Simpson appears to agree with the Eagle rationale. In Simpson, the Court states as follows:

> "We believe that several tools of statutory construction applied to the statutes in a case like the present one -- where the Government relied on the same proof to support the convictions under both statutes -- require the conclusion that Congress cannot be said to have authorized the imposition of the additional penalty of §924(c) for commission of bank robbery with firearms already subject to enhanced punishment under §2113(d) . . ." (Citations ommitted) Simpson supra 435 U.S. at pp. 12, 13

Again the Court states:

> ". . . to construe the statute to allow the additional sentence authorized by §924(c) to be pyramided upon a sentence already enhanced

> under §2113(d) would violate the established rule of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor or lenity." . . . The legislative history of §924(c) is of course sparse, yet what there is -- particularly Representaive Poff's statement and the Committee rejection of the Dominick amendment -- points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of §2113(d). . . ."
> (Citation ommitted) Simpson supra 435 U.S. at pp. 14, 15

Finally,

> " . . . our result is supported by the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later . . ."
> (Citation ommitted) Simpson supra 435 U.S. at pp. 15, 16

Thus, the rationale of Simpson, especially the language quoted above, is consistent with Eagle. However, the matter becomes clouded by Simpson's instructions to the Lower Court on remand. The instructions are as follows:

> " . . . Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c). The cases are remanded to the Court of Appeals for proceedings consistent with this opinion . . ."
> (Citation ommitted) Simpson supra 435 U.S. at p. 16

The Third Circuit in the instant case says Simpson rejects Eagle. Petitioner contends that Simpson adopts Eagle. There is need for further clarification.

The Fifth Circuit, in United States v. Nelson, 574 F.2d 277 (1978), decided after Simpson, attempts to interpret Simpson. In Nelson, defendant was convicted of bank robbery under 18 U.S.C. §2113(d) and using a firearm to commit a felony under 18 U.S.C. §924(c), and concurrent sentences were imposed. Because in Simpson consecutive sentences had been imposed, the Government attempted to argue that the differences in sentencing precluded Simpson's application. The Fifth Circuit disagreed and held that because Simpson made no reference to the distinction between consecutive and concurrent sentences, Nelson was entitled to have his §924(c) conviction vacated.

In Simpson, this Court declined to review the Constitutional question based on the applicability of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution to the instant case. The holding and rationale instead was based exclusively on the statutory interpretation and legislative history of 18 U.S.C. §924(c). As argued in the two preceding arguments, relief can be granted to petitioner based on a statutory interpretation alone; but if this Court does not grant relief on this ground, then it can and should reach the the Constitutional question. Here, petitioner Busic has been subjected to multiple punishment based on two statutes which are not sufficiently distinguishable to permit the imposition of cumulative punishment. Therefore, petitioner, Michael M. Busic, respectfully requests that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted:

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action No. 76-137
MICHAEL M. BUSIC and ANTHONY LaROCCA, JR.,	:	
Defendants	:	

OPINION

BARRON P. McCUNE, District Judge
February 17, 1977.

On July 1, 1976, a 19-count indictment was returned by the Federal Grand Jury of this district charging the defendants, Michael M. Busic and Anthony LaRocca, Jr., with various offenses: conspiracy to possess and distribute about fifty pounds of marijuana (Count 1) and one pound of cocaine (Count 2); the distribution of 0.3 grams of marijuana (Count 3) and 0.1681 grams of cocaine (Count 4); using a communication facility (a telephone) to facilitate the distribution of the above substances (Count 5); and various weapons offenses and gun possession violations (Counts 6 - 19).[1/] These charges arose out of a drug conspiracy and subsequent shoot-out with federal agents at the Miracle Mile Shopping Center, Monroeville, Pennsylvania, which took place on May 13, 1976.

The defendants were tried on these charges before a jury of this district and were found guilty[2/] on September 15, 1976.

1/ Of these counts, 7 (Counts 6-11, 13) applied to both defendants, 2 (Counts 12 and 19) applied to LaRocca only, and 5 (Counts 14-18) applied to Busic only.

2/ The defendant, LaRocca, was found guilty on all 14 charges brought against him. The defendant, Busic, was found guilty on 16 of 17 charges brought against him. Busic was found not guilty as to Count 17 of the indictment which charged a violation of 18 U.S.C. Sec. 924(c).

Presently before the court are the defendant's motions for Judgment of Acquittal and New Trial. After a thorough consideration of the briefs submitted by the respective parties, and following oral argument, we will deny the motions.

The evidence presented by the Government during the trial consisted of the testimony of those federal agents who were involved in an investigation into the defendants' alleged drug dealings and who were also present at the May 13, 1976 shoot-out. The Government's chief witness was Charles D. Harvey, an undercover agent with the Drug Enforcement Administration, Joint Narcotics Task Force.

Agent Harvey testified[3/] that he first met with the defendants in the late afternoon of May 7, 1976, at the Monroeville apartment of Richard Hervaux, a government informant. During that meeting it was agreed that Harvey would serve as a driver and would transport a quantity of marijuana from Florida to Pittsburgh for an intended distribution in this area. The next evening, May 8, 1976, a second meeting took place in Hervaux's apartment at which time the defendant, Busic, did not appear. At this meeting various prices for bales of marijuana and a pound of cocaine were discussed between Harvey and LaRocca.

Harvey did not meet with the defendants again until the evening of May 11, 1976, at which time Harvey was given samples of cocaine and marijuana which he took to the Allegheny County Crime Lab for analysis.

On May 12, 1976, LaRocca telephoned Harvey on two occasions. During one of the calls LaRocca supplied Harvey with a phone number in Florida so that Harvey could check the final

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3/ Portions of Harvey's testimony were substantiated by agents William J. Petraitis, William F. Alfree and John J. Macready, all of whom were present at the scene of the shoot-out on May 13, 1976

arrangements for closing the deal. By the time of the second call, Harvey had booked a flight to Florida under a fictitious name and communicated this to LaRocca. Later that day, at 5:30 P.M., Harvey called LaRocca and was informed by LaRocca that he wanted to see the "purchase money" prior to Harvey's trip. Harvey agreed to meet LaRocca the next day and show him the money.

Further, LaRocca instructed Harvey to call one, "Lewis", in Florida later that evening who would tell Harvey if all arrangements were in readiness. Harvey placed the call at 10:05 P.M. that night and the arrangements were confirmed.

On May 13, 1976, pursuant to LaRocca's request, Harvey called LaRocca at approximately 11:30 A.M., and informed LaRocca that he had acquired the money and would show LaRocca the money. They arranged to meet in the Miracle Mile Shopping Center in Monroeville, Pennsylvania, that afternoon. Pursuant to this arrangement, Harvey drove there alone (with surveillance units in support) and arrived at the designated location around 1:00 P.M. He had $30,000 of government money with him in a brown paper bag locked in his trunk. LaRocca and Busic arrived in LaRocca's car.

Harvey parked his car in the parking lot of the shopping center and the defendants pulled beside him and parked. Harvey then drove his car away from LaRocca's to a distance of "one-half block" away. Harvey then left LaRocca's car, as did LaRocca, and they met approximately half-way between the two cars. Together they walked to Harvey's car and entered it and Harvey drove to the far end of the parking lot. During this time, LaRocca, upon Harvey's request, took off his jacket and laid it on the front seat between them. After they stopped, both Harvey and LaRocca got out of the car. Harvey opened the trunk and the bag, and showed the money to LaRocca. They then re-entered Harvey's car and proceeded toward LaRocca's car. At this point, Harvey stated that he glanced down

at the seat and noticed "a revolver or a pistol" sticking out from under LaRocca's jacket. Harvey again parked about one-half block away from LaRocca's car for "safety" reasons. LaRocca then went for his weapon which caused Harvey to jump from his car and walk rapidly away from it. LaRocca chased him with his coat wrapped around the gun which he held, caught Harvey, cocked the gun, stuck it "in (Harvey's) chest" and demanded the money. La Rocca took Harvey's keys, opened the trunk, took the bag containing the money and backed away from Harvey intending to return to his car.

At that point, Harvey gave a pre-arranged signal to the other agents [4/] serving as surveillance units in this area who began to close in on LaRocca. Five shots were fired by LaRocca: one at Harvey, three at Macready and Ferrara's vehicle, two of which struc the passenger door; and one at Petraitis and Alfree's vehicle, which skimmed off the hood of the car and struck the windshield "head high." Within moments, LaRocca was arrested. [5/]

During this time, Busic was not involved in the gun fire. He testified that he had been in the shopping center purchasing a pack of cigarettes. [6/] He was arrested in the parking lot. A Beretta was found in his possession. Prior to his arrest he stated: "Just remember that I didn't shoot at anybody and I didn't draw my gun."

4/ The other agents were: Petraitis and Alfree; Morgan and Tate; a Macready and Ferrara.

5/ The gun which LaRocca was using was a .330 caliber Beretta which had a capacity of seven rounds. Upon analysis, it was determined that five rounds were fired, two rounds remained in the gun, and it remained cocked and ready to fire. Three shell casings were also found in the parking lot. One round was removed from a Lincoln Continental parked nearby.

6/ This aspect of the evidence was not conclusively proven through the testimony of Mary Lou Caliguri, a cashier at the Thrift Drug Store, Miracle Mile Shopping Center, Monroeville, Pennsylvania (TT. 373-380), although Busic so testified (TT. 410-411).

After the arrests were made, agent Petraitis looked into LaRocca's car and observed a black briefcase, which was open, on the floor in front of the passenger's seat. Upon an inspection of the briefcase, he discovered a semi-automatic Ruger pistol with a large cylinder (silencer) attached to the muzzle. Also found in the briefcase were two full magazines and a plastic box containing ammunition. The next day, an inventory search of the automobile was conducted. A box of .83 caliber ammunition was found in the glove compartment, and blackjacks and "noon choca" sticks were found in the trunk. Another Ruger, with a silencer attached, was found on the floor of the automobile under the driver's seat.

The defendant, Busic, testified on his own behalf to the effect that Richard Hervaux 7/ initiated the narcotics deal with the sole purpose of stealing the "front money" from Harvey, and represented to agent Harvey that the defendants were representative of a drug dealer in Florida. Further, Busic testified that by May 12, 1976, he and LaRocca had decided to back out of the deal but Hervaux was persistent about them going to the shopping center on the 13th in order to take the money from Harvey. In effect, Busic attempted by his testimony to show that he and LaRocca were victims of the Government's entrapment perpetrated by agent Harvey and the informer, Hervaux.

This entrapment defense was contradicted by the Government's rebuttal witness, Curwood Masters, a special agent for the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, who testified that from 8:10 P.M. until 9:15 P.M. on May 5, 1976, two days prior to Harvey's initial meeting with the

7/ Hervaux was not called by either the government or the defendant Fred C. Koerhner, the court-appointed private investigator for Busi stated that he knew Hervaux's address, had been to his apartment twice, that Hervaux had tried to call Koerhner without success and Koerhner had been unable to serve a subpoena. However, although he had been appointed during the first week of August, 1976, he had no tried to serve a subpoena until Friday, September 10, 1976, after trial was underway. Trial began September 3, 1976. Koerhner tried again Sunday night, September 12, 1976.

defendants, he was forced to hide in the closet of Hervaux's apartment (when he happened to be there when LaRocca unexpectedly dropped in) and while so located, overheard a conversation between LaRocca and Hervaux. He testified that LaRocca, and not Hervaux, initiated a conversation concerning narcotics and that LaRocca approached Hervaux about buying marijuana at that time.

With this factual background established, we turn to a consideration of the various arguments advanced by the respective defendants.

Pretrial Rulings

With regard to this court's pretrial rulings, defendants advance three contentions. First, both defendants allege that this court's refusal to sever the trials of the defendants consituted error. Second, they allege error in this court's refusal to sever their trial on firearms charges from the other counts of the indictment, thereby permitting the Government to prove both defendants' prior criminal convictions. Thirdly, they contend that this court erred in refusing to grant a continuance to them when the court-appointed investigator required additional time to track down recently discovered leads bearing on their entrapment defense. We disagree with all of the above contentions.

The tests for joinder of counts and defendants are found in Rule 8(b) of the Federal Rules of Criminal Procedure. See, United States v. Somers, 496 F.2d 723, 729, fn. 3 (3d Cir. 1974), cert den. 419 U.S. 832, 95 S. Ct. 56, 42 L. Ed. 2d 58 (19 Rule 8(b) provides:

> "(b). Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The severance of offenses or defendants is a matter committed to the discretion of the trial court and will not be disturbed absent a clear showing that this court abused that discretion. United States v. Armocida, 515 F.2d 29, 46 (3d Cir. 1975), cert. den., 423 U.S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84 (1975).

In the instant case, the various criminal acts, including the firearms violations, charged in the indictment which were supported by the evidence, revealed a common criminal scheme in which the defendants jointly participated. Thus, this court properly exercised its discretion in permitting the counts and the defendants to be tried together. See, United States v. Stringi, 378 F. 2d 896 (3d Cir. 1967), cert. den. 389 U.S. 846, 88 S. Ct. 100, 19 L. Ed. 2d 113 (1967).

Defendants' third contention is likewise without merit for two reasons. First, Fred C. Koerhner, the court-appointed private investigator for the defendant, Busic, had all of a month to investigate and was permitted to continue his investigation during the defendants' trial (TT.6). Although he was unsuccessful in serving Richard Hervaux, he did not try to serve him until trial was underway. Second, the entrapment defense was sufficientl raised by Busic's testimony without Koerhner's investigatory assistance. Hervaux was an informant but he was well known to both defendants.[7a/] Further, we were required to try defendants speedily.

The Conspiracy Counts

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the Government at trial was legally insufficient to establish the existence of a conspiracy as charged in Counts 1 and 2 of the

7a/ Hervaux is a motorcycle dealer. Incidentally, Curwood Masters had gone to Hervaux's apartment to discuss a motorcycle.

indictment. We disagree. As to Counts 1 and 2, a review of the record reveals that the evidence presented was more than sufficie to establish that a conspiracy to distribute drugs existed. Agent Harvey's testimony, as substantially summarized, supra, clearly reveals that the defendants did meet and conspire together, from May 7, 1976, to May 13, 1976, for the purpose of ultimately posses ing and distributing certain drugs for their own profit.

As to Count 5, defendants contend that since the drug transactions were never completed, 21 U.S.C. Sec. 843(b) [8/] was not violated. In support they cite United States v. Leslie, 411 F. Supp. 215 (D. Del. 1976). Our research indicates that this is the only case to date which has discussed this particular issue. However, we cannot agree with the decision of that court. In Count 5, certain violations of 21 U.S.C. Sec. 846 were alleged. These violations of Sec. 846 are felonies within the meaning of Sec. 843(b). Thus, although actual distribution never took place, the evidence was sufficient to show that certain acts proscribed by Sec. 846 and punishable under Sec. 843(b), took place, and, therefore, Sec. 843(b) was violated. See United States v. Turner 528 F.2d 143, 165 (9th Cir. 1975). We, therefore, find no merit in defendants' arguments as to the charges contained in Counts 1, 2 and 5.

Firearms Violations

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the

8/ Section 843(b) of Title 21 of the United States Code provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of (Title 21, respecting Drug Abuse Prevention and Control). . . . Each separate use of a communication facility shall be a separate offense under this section. . . .(T)he term "communication facility". . . includes. . .(the) telephone. . ." (Emphasis supplied).

Government at trial was legally insufficient to establish their guilt on the firearms violations as charged in Counts 13-16 of the indictment. They contend that, as to all of these counts, the evidence failed to establish a sufficient nexus with foreign and/or interstate commerce. Further, with regard to Count 13, they contend that the evidence failed to establish (1) that LaRocca was aided and abetted by Busic in receiving a firearm, and (2) the time and venue of LaRocca's receipt of the firearm. We must disagree with the above contentions.

Count 13 charged violations of 18 U.S.C. Sections 922(h)[9] and 924(a),[10] arising out of LaRocca's receipt (aided and abetted by Busic) of a .22 caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, serial number 11-87863, which had been transported in interstate commerce. His receipt of this pistol occurred subsequent to two convictions of March 16, 1970 and December 12, 1973, and his release from prison on January 12, 1976.

The record reveals that Busic purchased this pistol on April 5, 1973, from Gerald Braverman, Vice-President of Braverman Arms Company, Wilkinsburg, Pennsylvania (TT. 93), and that this pistol was manufactured in Southport, Connecticut (TT. 99). Subsequent to Busic's purchase of this pistol, this weapon was found in LaRocca's possession. The evidence thus revealed that LaRocca received this weapon after its interstate shipment and within the Western District of Pennsylvania. We believe that this

9/ Section 922(h) provides, in pertinent part:
"(h) It shall be unlawful for any person --
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;. . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

10/ Section 924(a) provides, in pertinent part:
"(a) Whoever violates any provision of this chapter. . . shall be finednot more than $5,000, or imprisoned not more than five years, or both. . . ."

evidence was sufficient to show the time and venue of receipt by LaRocca of this weapon.

Counts 14 through 16 applied to Busic only and charged violations of 18 U.S.C. Sec. 1202(a)(1).[11] Count 14 concerned Busic's possession of a Beretta which he was carrying at the time of his arrest. Counts 15 and 16 concern his possession of two Strum-Rugger pistols. As to these three counts, Busic contends th there was no showing of a recent interstate nexus as to the offens of possessing as required by United States v. Bass, 404 U.S. 336 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

It is clear that with regard to Counts 14 - 16, Busic's conviction cannot stand unless an interstate nexus is shown. United States v. Bass, supra. Our research of the law reveals that the Third Circuit has not (to date) discussed or ruled upon the "possession" offense of Sec. 1202(a)(1). However, on two occasions courts of this district have addressed this issue. Unit States v. Graves, 394 F. Supp. 429, 434 (W.D. Pa. 1975); United States v. Letky, 371 F. Supp. 1286, 1289-90 (W.D. Pa. 1974). In both cases it was noted, citing Bass, that as to the offense of possessing, the interstate commerce requirement is satisfied if it is shown that at the time of the possession, the firearm was moving interstate, or on an interstate facility, or if the possession affected commerce. Further, both of these cases held that this interstate commerce requirement was met by proof that at any time prior to possession the firearm had traveled in interstate

11/ Section 1202(a)(1) provides:
"(a) Any person who - -
(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not morethan two years, or both."

commerce. We believe that the evidence presented by the Government at trial was sufficient to satisfy the interstate commerce requirement enunciated in Bass, and set forth in cases within this District.

Assault Charges

Busic contends in his motion for Judgment of Acquittal that the evidence was legally insufficient to establish his participation with LaRocca in the assaults on the federal officers who were involved in the shoot-out of May 13, 1976, as charged in Counts 6 and 7 of the indictment, in violation of 18 U.S.C. Sections 2, 111, 1114.

Busic argues that when the defendants went to the shoppi center on May 13, 1976, for the purpose of robbing Harvey, only LaRocca perpetrated the actual assault on Harvey and the other supporting agents; and that Busic never participated in these actions, nor did he draw or fire his weapon. Thus, he argues that although the evidence supports a finding of a conspiracy by LaRocc and Busic to rob and assault Harvey, it does not support a finding that he conspired with LaRocca to assault the other officers prese at the scene. Therefore, he asserts that it was error for this court to charge the jury under Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), that these "additional" assaults were in furtherance of their original conspiracy to possess and distribute drugs. We disagree.

We believe that LaRocca's acts are attributable to Busic. The evidence is clear that the defendants conspired and made arrangements with certain individuals in Florida to obtain a certain quantity of marijuana and cocaine for the purpose of distributing these drugs in the Pittsburgh area. Agent Harvey was

originally asked to transport these narcotics for them from Flori to Pittsburgh. After Harvey showed an interest in possibly obtai ing a quantity of these drugs and offered a sum of money for thei purchase, the defendants conceived of a scheme to rob Harvey on M 13, 1976.

To say that their assault on the federal officers was n in furtherance of their original conspiracy relating to the obtai ing and distributing of drugs is completely contrary to the evidence presented. Harvey was present at the shopping center only the purpose of showing them the "front money" for the purchase of the discussed drugs. The arrangements for the sale, the Florida trip and the notice of the trip to the defendants' drug connection in Florida had been made. All that was left to be performed was the trip itself and the payment by Harvey. At any rate, the cash which Harvey brought with him that day was to be used for the intended purpose of purchasing the drugs previously discussed. Harvey, himself, was not certain that a robbery was to occur, but was required to protect himself and the government money. Clear the evidence presented a continuing conspiracy, and the intended robbery of Harvey by the defendants on May 13, 1976, was in furt ance of their original drug conspiracy. Therefore, although Bus did not physically participate in the shoot-out and assaults, he was and remained as much a part of the original conspiracy as wa LaRocca, and is, thus, just as responsible for the actions of LaRocca in the assaults on the other federal officers involved a LoRocca is. The jury was entitled to infer that if defendants l stolen the money they could have used it to buy the drugs for themselves.

For these reasons, we likewise find no merit in Busic argument that the evidence was insufficient to establish that h unlawfully possessed a firearm and participated in the various

felonies, including the assaults on the federal officers, as charged in Count 18 of the indictment, which charged a violation of 18 U.S.C. Sec. 924(c), a separate offense which forbids the carrying of a firearm during the commission of any felony prosecutable in federal court.

Entrapment

The defendants' arguments in support of this defense revolve around the actions of the government's informant, Richard Hervaux, prior to May 13, 1976. During the various meetings involving the defendants and agent Harvey, which took place in Hervaux's apartment, Hervaux was always present.

In support of an entrapment defense, Busic advances the following argument: that he testified that it was Hervaux that conceived the plan to rob Harvey on May 13th under the pretext of selling him drugs, and that Hervaux, not the defendants, provided the quantities of marijuana and cocaine which were given to Harvey; moreover, although Busic readily admitted a plan to rob Harvey, he continually denied that he was involved in a scheme to transport and sell large quantities of cocaine and marijuana from Florida. We find no merit in these arguments.

The most recent pronouncement by the Supreme Court concerning the defense of entrapment is found in Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), wherein the following is stated:

> "If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission. . . ,' the defendant is protected by the defense of entrapment."

425 U.S. 490, 96 S. Ct. 1650. This court properly charged on

entrapment in the manner set forth in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, Sec. 13.13 (2d Ed. 1970, 1975 Supplement) which was cited with apparent approval by this Circuit in United States v. Silver, 457 F.2d 1217, 1220 (3d Cir. 1972), and later expressly approved in Government of Virgin Isla v. Cruz, 478 F. 2d 712, 717, n.5 (3d Cir. 1973), and United Stat v. Watson, 489 F.2d 504, 506 (3d Cir. 1973).

The jury had ample evidence before it that the defenda LaRocca, initially approached Hervaux on May 5, 1976, concerning a possible purchase of marijuana. When Busic entered into negotiations and discussions which began on May 7, 1976, and lasted through May 12, 1976, their contact in Florida had been establis and all plans had been made for Harvey's trip to Florida to obta quantities of marijuana and cocaine and distribution of these dr in this area. Although Busic testified that Hervaux initiated the discussions conerning the drugs, the testimony of Curwood Masters sufficiently rebutted this line of testimony and the jur was justified in believing that the defendants had the predisposition to devise the scheme for the drug purchase and carry ou plans to that end. Therefore, the defendants' entrapment arguments are without merit.

Jury Charge

Both defendants advance three essential arguments on their post-trial motions. First, they contend that the court incorrectly charged the jury regarding the firearms charges involving their movement in interstate commerce by stating that this element was satisfied if the evidence showed movement in foreign or interstate commerce at any time. Second, they conten that the court erred in refusing to charge the jury regarding th Government's failure to call Richard Hervaux, a government informant and essential witness, who was peculiarly under the

Government's control. Thirdly, Busic contends that with regard to the assault charges, this court erroneously charged the jury to the effect that he was guilty of the assaults if he went to the shopping center as part of a conspiracy to rob Harvey and did not withdraw. LaRocca advanced a similar argument with regard to the conspiracy charges against him, namely that this court erroneously charged the jury that a conspiracy to rob Harvey was merely a continuation of an ongoing conspiracy to distribute drugs. We are compelled to reject the first and third arguments for the reasons stated earlier in this opinion.

Only the second argument deserves a brief comment here. Hervaux would have indeed been an important witness in this case. However, he was not, as defendants contend, peculiarly under the Government's control. He was available to be called by either party. In fact, the defendants knew his address and, through Koerhner, attempted to subpoena him without success. We do not believe that the Government's failure to call Hervaux as a witness, therefore, justified a charge to the effect that Hervaux's testimon would have been adverse to the Government if he had been called. We thus find no merit in this argument by defendants.

We likewise find no merit in the defendants' remaining contentions, and therefore dismiss their motions for Judgment of Acquittal and New Trial.

An appropriate order follows.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action No. 76-137
MICHAEL M. BUSIC, and ANTHONY LaROCCA, JR.,	:	
Defendants	:	

ORDER

AND NOW, February 17, 1977, the defendants' Motion for Judgment of Acquittal and New Trial are hereby denied. Imposition of sentence is fixed for March 11, 1977, at 3:00 P.M. in Court Room No. 10.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375

77-1376

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL BUSIC,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY LA ROCCA, JR.,

Appellant.

Appeal from the Judgment and Conviction
of the United States District Court
for the Western District of Pennsylvania.

Argued October 21, 1977

Before Van Dusen and Rosenn, Circuit Judges,
and Stern,* District Judge

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX "B"

OPINION OF THE COURT

(Filed JAN 5 1978)

STERN, District Judge

On this appeal we must decide whether a defendant may receive consecutive sentences for the crime of assault with a dangerous weapon [18 U.S.C. §111] and the crime of use of a firearm to commit that felony [18 U.S.C. §924(c)(1)], where the dangerous weapon used in the assault is a firearm. We hold that such sentencing violates the double jeopardy clause and we remand La Rocca's case to the district court for re-sentencing.

Defendants also cite as error the trial court's refusal to sever for trial those counts of the indictment which required proof of defendants' prior felony convictions. We hold that, on the facts of this case, the refusal to sever those counts was harmless error. The other challenges raised by defendants, including the contention that the trial court erred in refusing to give a "missing witness" instruction, we find to be without merit and, thus, we affirm defendants' convictions in all other respects.

I.

As the record at trial reveals, Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob "front money" from an undercover agent. This attempted robbery culminated in a shootout with federal agents.

On this appeal, we must view the evidence in the light most favorable to the government. See Glasser v. United States, 315 U.S. 60 (1942). Thus viewed, the evidence might be summarized as follows. Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the

defendants and received samples of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some "front money". A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment. (Tr. 44).

In addition to evidence regarding the conspiracy and subsequent shootout, the government also introduced in its case-in-chief evidence of defendants' prior convictions for the purpose of proving that defendants were convicted felons and, thus, had received firearms in violation of 18 U.S.C. §922(h). Counsel for the defendants stipulated that Busic and La Rocca had been jointly convicted in 1973 for assault on two federal officers, theft of government property

and use of a firearm to commit these felonies. These convictions were introduced through the testimony of agent Petraitis and the actual certificates of conviction, although the government was not permitted to elicit the facts underlying these convictions. (Tr. 195).

Defendants raised the defense of entrapment. Busic took the stand on his own behalf, claiming that Hervaux had initiated the scheme to rob Harvey and further claiming that, despite his and La Rocca's efforts to back out of the scheme, Hervaux had urged them on. (Tr. 388-414). La Rocca did not himself testify, but called his common-law wife, Janna K. Sam, who testified that La Rocca avoided the repeated phone calls he received from Hervaux during the time period in question. (Tr. 470-472) In addition, defendants attempted to show the unavailability of Richard Hervaux, through the testimony of their court-appointed investigator, Fred Koerhner, who testified that he had twice attempted, unsuccessfully, to serve Hervaux. (Tr. 381). At this time, the government offered itself to serve Hervaux, but defense counsel declined the offer. (Tr. 385-386). Defendants requested, and were denied, a "missing witness instruction" which would have instructed the jury that it was entitled to draw an adverse inference based on the government's failure to call Hervaux to the stand.

The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having used a firearm to commit the drug conspiracy and assaults on federal officers, in violation of §924(c)(1); Busic for having carried a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts -- all to run consecutively to each other -- for a total of 30 years for each defendant.

II

Defendants' first and most formidable challenge is directed at 18 U.S.C. §924. That statute penalizes a person who either:

> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

18 U.S.C. §924(c) (Emphasis supplied). The statute further provides for a mandatory sentence of one-to-ten years for first offenders, and two-to-twenty-five years for subsequent offenders.[1/]

Busic was indicted, convicted and sentenced under subsection (2) of this statute for having carried a firearm unlawfully during the commission of two federal felonies: drug conspiracy and assault on federal officers; La Rocca was indicted, convicted and sentenced under subsection (1) for having used a firearm to commit these same felonies. In addition, each defendant received consecutive sentences

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1/ The full text of 18 U.S.C. §924(c) provides as follows:

> (c) Whoever --
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

under the enhanced penalty provision of 18 U.S.C. §111 for having assaulted federal officers with a "dangerous or deadly weapon."[2/]

A

Defendants argue that conspiracies to commit drug offenses (21 U.S.C. §846) and assaults on federal officers (18 U.S.C. §111) are not "felonies" within the meaning of 18 U.S.C. §924(c). We disagree.

Section 924, Title 18, is part of the Gun Control Act of 1968, enacted in the wake of the political assassinations of that decade. The purpose of that legislation was "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the states effectively to regulate firearms traffic within their borders." H. Rep. No. 1577, 90th Cong. 2d Sess., reprinted in (1968) U.S. Code Cong. and Ad. News 4410, 4411. Toward that end, Congress enacted 18 U.S.C. §924(c)(2) which makes it a federal crime to possess an unregistered firearm, federal jurisdiction being predicated upon commission of a federal felony while in possession of such a weapon. The statutory scheme shows that Congress was concerned not only about persons who possess unregistered firearms, but also about persons who, although in lawful possession of a firearm, use it to commit a federal felony. See 114 Cong. Rec. 22235-7 (1968). Thus, in subsection (1)

2/ Title 18 U.S.C. §111 provides for a sentence of up to three years for simple assault; up to ten years where an assault is committed with a "deadly or dangerous weapon":

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

of the statute, Congress created a crime separate from that created in subsection (2), making it a federal crime to use a firearm -- whether registered or unregistered -- to commit a federal felony.

In view of the broad objectives of the legislation, we cannot agree with defendants that the term "felony" in §924(c)(1) should be narrowly construed so as to exclude narcotics conspiracies and assaults on federal officers.[3/] The construction urged by defendants would limit the ambit of subsection (2) whose purpose was to reach the unlawful possession of all firearms, with commission of a federal felony being merely a jurisdictional linchpin. Accordingly, we hold that §924 emcompasses the federal felonies with which defendants were charged.

B.

A different question is posed, however, as to whether the double jeopardy clause protects a defendant from being convicted both of the

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3/ That Congress intended the term "felony" to be broadly construed finds support in the legislative history of §924. During the House debates on the bill, Representative Casey proposed a version that would have limited the operation of the statute to certain enumerated violent crimes. See 114 Cong. Rec. 21061-3; 21765-5. The rejection of this version suggests that Congress did not wish to thus limit the statute. Indeed, in keeping with the ambitious purposes of the statute, §924 has been applied to a broad range of felonies. See, e.g., United States v. Howard, 504 F.2d 1281 (8th Cir. 1974) (counterfeiting); United States v. Ramirez, 482 F.2d 807 (2nd Cir.), cert. denied, 414 U.S. 1070 (1973) (narcotics offenses conspiracy); United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972) (sale of heroin).

The only suggestion to the contrary is the remarks of Representative Poff, the bill's sponsor, that:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officers, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other felonies.

114 Cong. Rec. 23904-5 (1968). Although a strong statement by the sponsor of a bill made expressly for the sake of legislative history carries great weight, it is not necessarily dispositive and we need not narrowly construe this statute -- which by its language and legislative history was obviously intended to be broad in its reach -- on the basis of this statement.

crime of use of a dangerous weapon to assault a federal officer (18 U.S.C. §111) and use of a firearm to commit that felony [18 U.S.C. §924(c)(1)]. On this, there appears to be some disagreement among the circuits.

In United States v. Engle, 539 F.2d 1166 (8th Cir. 1976), cert. denied, 97 S.Ct. 1146 (1977), defendant, an Indian, was convicted of assault with a dangerous weapon upon the person of another Indian on a reservation, in violation of 18 U.S.C. §1153. The defendant was also convicted for use of a firearm to commit the offense, as proscribed by 18 U.S.C. §924(c)(1). The Eighth Circuit avoided the double jeopardy issue, holding as a matter of statutory construction that Congress did not intend Section 924 to encompass statutes that already provide for added penalties where weapons are used. In so holding, it relied on the remarks of Representative Poff, the bill's sponsor, that §924 should not be construed to encompass felonies for which there is already an added penalty for the use of a weapon. See, 114 Cong. Rec. 23904-5 (1968).

In United States v. Crew, 538 F.2d 575 (4th Cir. 1976), cert. denied, 97 S.Ct. 144 (1977), defendant was convicted under 18 U.S.C. §2113, the federal bank robbery statute which, like 18 U.S.C. §111, provides for an enhanced penalty where a "dangerous weapon" is used. He was also convicted under §924(c)(1) for using a firearm to commit that felony, and under §924(c)(2) for carrying a firearm unlawfully during the commission of that felony. He received consecutive sentences under each of these three counts. The Fourth Circuit held that conviction and consecutive sentences under both §2113 and §924 (c)(1) did not violate the double jeopardy clause because each statute requires proof of different elements:

> In order to sustain a conviction under Section 2113(d) the government must establish that the perpetrator assaulted a person, or jeopardized the life of a person, by using a dangerous weapon or device during the commission of the robbery. In comparison, in order to sustain a conviction under Section 924(c) the government must establish that the perpetrator used or carried a firearm during the commission of a felony. The appellants would have us equate "using a dangerous weapon or device" with "used or carried a firearm" and find that the prohibition against double jeopardy has been violated. However, it is clear that Congress never intended to equate these terms.

> The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of any weapon or device during the course of a bank robbery which jeopardized the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are affirmed.

Id., at 477-478.

A somewhat different approach was taken by a district court in United States v. Hearst, 412 F.Supp. 877 (N.D.Cal. 1976) in ruling on a motion to dismiss an indictment charging both armed bank robbery and use of a firearm to commit that felony. Although it denied the motion, the court indicated that consecutive sentences under both counts might contravene the constitutional guarantee against double jeopardy:

> ... [I]t is a settled principle of law that two separate offenses arising out of the same act or transaction may be charged where "each [statutory] provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299 304 ... (1932). This standard is satisfied by the two offenses charged here, for the reason that the first requires the use of any dangerous weapon in the robbery of a bank, whereas the second specifically requires the use of a firearm in the commission of any felony.
>
> It is, of course, an altogether different question whether the defendant may or should be punished twice through consecutive sentences for the conviction of two offenses arising out of a single act. In denying the motion to dismiss either indictment for violation of the double jeopardy clause the Court does not intend to foreclose the defendant from raising the question of double punishment should she be convicted under both counts of the indictment and the Court be required to pass sentence. In that eventuality the Court will be open to any arguments the defendant may have against compounding sentences for these alleged offenses.

Id., at 878-879. (Emphasis in original).

We agree that an indictment charging violation of both sections 111 and 924(c)(1) does not on its face implicate the double jeopardy

clause: §111 punishes assault with a deadly or dangerous weapon -- which could be a knife or an explosive as well as a firearm; §924(c)(1) punishes the use of a firearm to commit a felony -- which could be any felony. However, where the deadly weapon used in a §111 charge is a firearm and the felony charged in a §924(c)(1) count is an assault and the government does not prove additional elements for either offense, it is clear that a defendant will be twice punished for the identical offense if he is sentenced under both counts.

Multiple punishment for the same offense at a single trial is forbidden by the double jeopardy clause. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873). See generally, Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965). In a line of cases, the Supreme Court has continued to assume the validity of this principle, but has generally found the misconduct at issue to constitute distinct offenses. See, e.g., Gore v. United States, 357 U.S. 386 (1958), reh. denied, 358 U.S. 858 (1958); Blockburger v. United States, 284 U.S. 299 (1932); Morgan v. Devine, 237 U.S. 632 (1915); Gavieres v. United States, 220 U.S. 238 (1911); Burton v. United States, 202 U.S. 344 (1906). The test enunciated by the Court is whether "each provision requires proof of a fact which the other does not." Blockburger v. United States, supra, at 304. See also, United States v. Kenny, 462 F.2d 1205 (3rd Cir.), cert. denied, 409 U.S. 914 (1972); United States v. Johnson, 462 F.2d 423 (3rd Cir. 1972), cert. denied, 410 U.S. 932 (1973).[4/]

4/ For the sake of clarity, we would note that the principles of double jeopardy relied on herein are distinguishable from the principles relied on by the Supreme Court in ruling on the propriety of consecutive sentencing under the subsections of the bank robbery statute, 18 U.S.C. §2113. In Prince v. United States, 352 U.S. 322 (1957), the Court held as a matter of statutory construction that consecutive sentences could not be imposed under the subsections of that statute. Following Prince, we held in United States v. Corson, 449 F.2d 544 (3rd Cir. 1971) (en banc), that where a defendant is convicted under more than one subsection of §2113 the sentencing judge should impose a general sentence on all counts not to exceed the maximum permissible sentence which carries the greatest maximum sentence. See generally, Note, The Federal Bank Robbery Act - The Problem of Separately Punishable Offenses, 18 Wm. & Mary L.Rev. 101 (1976). Also distinguishable is the "merger" theory wherein a lesser included misdemeanor is said to merge into a felon thus permitting a sentence on only the latter. See generally, 22 C.J.S. Criminal Law §10, at 42-6.

On the facts of this case, it is clear that the elements proven under the §111 counts (Counts 6 and 7) and the §924(c)(1) count (Count 19) were identical: under Counts 6 and 7 the government proved assault on federal officers with a dangerous weapon which was a firearm. Under Count 19, the government proved use of the identical firearm to commit a felony which was the assault on the identical federal officers. Accordingly, we hold that when La Rocca was sentenced under Count 19 consecutively to Counts 6 and 7, he was twice punished for the same conduct. We remand this case to the district court at which point the government must move for resentencing under either Count 19 or Counts 6 and 7.[5/] The trial court may not impose a more severe sentence under either count. To do so would ignore the clear intent of this opinion and punish the defendant twice for the same offense. In future cases, where conviction is obtained under both §111 and §924(c)(1), and it is determined that the "deadly weapon" charged in the §111 count is the firearm charged in the §924(c)(1) count, and that the "felony" charged in the §924(c)(1) count is the assault charged in the §111 count, the court may sentence the defendant under one of the sections or the other, but may not sentence under both sections.

C.

While prosecution under the use provision of §924(c)(1) may, as in this case, create double jeopardy problems when coupled with a §111 count, prosecution under the carrying provisiosn of §924(c)(1) will not. The latter subsection contains an element not required to be proved under §111: the government must prove that the firearm was

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5/ While we recognize that La Rocca was charged in the §924 count with using a firearm to commit both assault and conspiracy, we cannot sustain his §924 sentence based on commission of conspiracy. It is a fair inference from the record that the conspiracy to distribute drugs terminated as of the time that defendants decided to rob Harvey. Nor are the convictions on the conspiracy counts conclusive, for the jury was entitled to convict defendants on these counts even if it found that the conspiracy was shorter in duration than was charged in the indictment. See, e.g., United States v. Somers, 496 F.2d 723 (3rd Cir.), cert. denied, 419 U.S. 832 (1974). In any event, since both conspiracy and assault were charged as the underlying felonies in Counts 6 and 7, we cannot tell on which the jury relied.

carried "unlawfully." As we read it, the term "unlawfully" requires the government to prove that the defendant's possession of the firearm violated federal, state or local registration laws. See, United States v. Rivero, 532 F.2d 450 (5th Cir. 1976); United States v. Howard, 504 F.2d 1281 (8th Cir. 1974); United States v. Ramirez, 482 F.2d 807 (2nd Cir.), cert. denied, 414 U.S. 1070 (1973). Therefore, as to Busic, consecutive sentences under §111 and §924 (c)(2) were premissible.[6/]

III

Defendants also cite as error the refusal of the district court to sever those counts of the indictment which charge them with receiving firearms while being convicted felons in violation of 18 U.S.C. §922(h).[7/] The indictment actually set forth in these counts that both defendants had been convicted in 1973 for assaulting two federal officers, theft of government property, and use of a firearm

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6/ We are mindful of the potential injustice caused by our decision today: La Rocca, who actually shot at the federal agents, may receive a lesser sentence than Busic, who was only vicariously liable for these assaults. However, the district court has authority to cure this disparity on a motion under Fed.R.Crim.P. 35.

7/ 18 U.S.C. §922(h) provides in pertinent part:

> (h) It shall be unlawful for any person -
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

to commit these felonies and, in addition, that La Rocca had also been convicted in 1970 of trafficking in machine guns, assault and battery, pointing a deadly weapon and possession of narcotics. On oral argument in this Court, however, it was agreed that the indictment was never shown to the jury.

Defendants argue that the district court's refusal to sever the §922 counts resulted in admission into evidence of their prior convictions in the government's case-in-chief which prejudiced them in the trial of the other offenses charged.

The question of severing for trial counts requiring proof of prior convictions from other counts which do not permit such proofs has received little attention in the circuits.[8/] In United States v. Park, 531 F.2d 754 (5th Cir. 1976), the defendant had been charged in a two-count indictment with a substantive narcotics offense and with receiving firearms while being a convicted felon. On appeal, he contended that he had been prejudiced at trial by joinder of these counts because it enabled the government to bring to the jury's attention the fact that he was a convicted felon. The Fifth Circuit held that the trial court's refusal to sever was not error because defendant's prior conviction for having knowingly manufactured drugs wou in any event, have been admissible on the other count. See also, United States v. Abshire, 471 F.2d 116 (5th Cir. 1972). A novel approach to this problem was adopted by the district court in United States v. Franke, 331 F.Supp. 136 (D.Minn. 1971). There, on a motion for severance, the district court granted defendant a two-stage trial, whereby the jury, having reached a verdict on the other counts, would then proceed to consider the counts requiring proof of prior convictions.

8/ Although little appellate attention has been directed to this issue, it appears that it has been the practice of some district courts to sever such counts. See e.g., United States v. Napier, 518 F.2d 316 (9th Cir.), cert. denied, 423 U.S. 895 (1975); United States v. Roberts, 503 F.2d 453 (8th Cir. 1974).

The defendants urge that the district court erred in refusing to sever the counts alleging violation of 18 U.S.C. §922(h), inasmuch as at the outset of the trial the district court had no way of knowing that the prior convictions alleged in the §922(h) counts might otherwise have been admissible on the other counts. On the facts of this case we find that the district court did not commit reversible error since the defendants raised the defense of entrapment at trial and the evidence of their prior convictions was admissible under Rule 404(b), Federal Rules of Evidence, to rebut this defense by proving predisposition. In addition, prejudice was minimized in this case: the jury was never shown the indictment, and the government was not permitted to elicit the factual basis of these convictions. For these reasons, we hold that the refusal to sever was harmless error.

Nevertheless, we think that in ruling on a pre-trial motion to sever the district court should determine whether evidence of the prior convictions would be independently admissible on the other counts. If it is determined that the convictions would not be admissible on the other counts -- that were these counts to be tried alone the jury would not hear this evidence -- then severance should be granted.[9/] In addition, we think that, in framing an indictment, the better practice dictates that the government should not set forth the details of defendants' actual convictions, but merely allege that the defendant is a convicted felon.

9/ Of course, we do recognize the difficulties inherent in such pre-trial determinations. Nevertheless, if the government chooses to join such counts, it must be prepared to justify the joinder to the trial judge by some showing that the prior convictions would be admissible even absent joinder. By the same token, in moving for severance of these counts, a defendant may be required to reveal some of his trial strategy, as to an entrapment defense or the like, in the resolution of his motion for severance.

If Defendant desires the particulars, he may, of course, so move for them. See Fed.R.Crim.P. 7.

IV

Defendants further contend that the trial court committed reversible error in refusing to instruct the jury that it might draw an adverse inference from the government's failure to call its informer, Richard Hervaux. Despite the fact that the government actually offered to serve Hervaux, defendants contend that the burden of calling him rested on the government, and that the government's failure to do so entitled defendants to a "missing witness" instruction. We agree with the district court that defendants were not entitled to the requested charge.

The basis of the "missing witness" inference is that, where a party fails to call an available witness whose testimony could be expected to favor him, a natural inference arises that that witness would have exposed facts unfavorable to that party. See, Graves v. United States, 150 U.S. 118, 121 (1893); Burgess v. United States, 440 F.2d 226 (D.C.Cir. 1970); 2 Wigmore, Evidence, 162, §289 (3d Ed. 1940). This Court has on several occasions addressed the applicability of this inference. Thus, in United States v. Jackson, 257 F.2d 41 (3rd Cir. 1958), we reversed a conviction based on the trial court's refusal to permit defense counsel to comment on the government's failure to produce its key informant, a man known only as "Sarge". In United States v. Restaino, 369 F.2d 544 (3rd Cir. 1966), however, we held that the government's failure to produce defendant's co-defendants who had pleaded guilty, and were known to and available to both sides, did not give rise to any inference as to whom their testimony could be expected to favor. More recently, in United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), cert. denied, 410 U.S. 968 (1973), we held that the government's failure to call an identification witness

would also not give rise to any inference. There, after stating that its application requires the witness to have special, non-cumulative information relevant to the case, we went on to note the weakness of the missing witness inference:

> Clearly, every absent but producible witness possessing some knowledge of the facts need not be made the subject of the inference. Often all that can be inferred is that the witness' testimony would not have been helpful to a party, not that the testimony would have been adverse.

470 F.2d at 230. (Emphasis in original).

As we noted in Hines, a party's failure to call a witness does not necessarily imply that the witness's testimony would have been unfavorable to that party. Although Hervaux may have had special knowledge relevant to this case, we think other considerations outweigh this reason for giving the missing witness instruction. Every experienced trial lawyer knows that the decision to call a witness often turns on factors which have little to do with the actual content of his testimony. Considerations of cumulation and jury fatigue may preclude calling a witness who is entirely helpful; calculations that a witness may help a lot but hurt a little may compel restraing when counsel believes that his burden is already met. Then, too, questions of demeanor and credibility, hostility, and the like may influence the government not to produce a witness whose testimony might be entirely harmful to the defendant.[10/] And, of course, as we noted in Hines, in many instances, a witness's testimony might have been neither helpful nor adverse to the party who failed to call him. Indeed, cases such as this one -- where both parties fail to call an available witness -- shatter the myth that an absent witness's testimony might be expected to be particularly favorable to either side.

Accordingly, we hold that where neither the government nor the defendant call a witness who is available to both, the "missing witness" instruction does not properly lie. See, United States v. Kenney,

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10/ We cannot help but note that the defendant who in summartion asks the question, "Why didn't the government call 'X'?" relies on the inability of the government to respond by advising the jury of any of these considerations, all of which are outside the record and some of which stem from the subjective judgment of the prosecutor.

500 F.2d 39 (4th Cir. 1974); United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967); United States v. Higginbotham, 451 F.2d 1283 (8th Cir. 1971).[11/] Under these circumstances, no inference as to the content of the missing testimony is possible since both sides may be presumed to wish to call a favorable witness, while both would not wish to call one who was adverse. This is not to say that the defendant does not have the absolute right to stand mute or to rest on the government's failure to produce affirmative evidence to substantiate any necessary elements of the offense charged. But it is one thing to rely on the government's failure of proof, and quite another to argue the existence of affirmative evidence, which the jury did not hear, inferred from the mouth of a witness who was not called. Thus, we agree with the district court that, under the circumstances of this case, defendants were not entitled to the missing witness instruction.

V

Defendants also challenge the trial court's refusal to sever their cases for trial, the admission into evidence of the rebuttal testimony of Special Agent Masters, and the sufficiency of the evidence to sustain Busic's conviction for assault.[12/] We find these challenges

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11/ The basis for denying an instruction under these circumstances was perhaps best stated by Judge Robb in his concurring opinion in Burgess v. United States, supra, at 239: "Having deliberately rejected an opportuni to produce a witness a defendant should not be permitted to complain that the witness is missing."

12/ Defendant Busic concedes that he aided and abetted the assault on Harvey, who was not a federal officer. However, he challenges the sufficiency of the evidence to sustain his conviction for assaulting federal officers Alfree, Petraitis and John Macready. We find this contention to be without merit since the evidence overwhelmingly supports his convictio under both a conspiracy and an aiding and abetting theory. See Nye & Nis v. United States, 336 U.S. 613 (1949); Pinkerton v. United States, 328 U. 640 (1946).

to be without merit.[13/] Thus, we affirm Busic's conviction in all respects. La Rocca's case is remanded to the district court for resentencing on either the counts alleging violation of 18 U.S.C. §111 or the count alleging violation of 18 U.S.C. §924(c)(1).

To the Clerk:

Please file the foregoing opinion.

HERBERT J. STERN, U.S.D.J.

13/ We have also considered and rejected the following challenges raised by defendants in their pro se briefs:

"1. Whether the remarks actions and conduct of the trial prosecutor was so flagrant and inflamnatory, or so prejudicial and violative of due process to justify a new trial.

2. Whether or not appellants were deprived of a fair trial when the trial court denied them a severance; in light of the extreme prejudice to one defendant or the other inevitable.

3. Whether the trial judge was prejudicial to the extent of depriving appellants of a fair and impartial trial.

4. Whether appellants were deprived of due process when they were deprived of a prompt post-arrest arraignment.

5. Whether the defendants were deprived of due process when the government failed to produce the key government alleged informant in the case -- Richard Jervaux.

6. Whether the appellants were deprived of due process when they were denied Jenks Act discoverable materials.

7. Whether or not appellants were deprived of effective assistance of counsel, and counsel who suppressed evidence favorable to his clients.

8. Whether or not the government met its burden to sustain the convictions that appellants conspired to obtain, distribute and sell controlled substances; or that any conspiracy existed at all."

(Appellants' Pro Se Brief, at 7).

United States Court of Appeals

for the Third Circuit

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL

Michael M. Busic, Appellant in No. 77-1375

UNITED STATES OF AMERICA

vs.

LA ROCCA, ANTHONY

Anthony La Rocca, Jr., Appellant in No. 77-1376

(D. C. Criminal Nos. 76-137-1 and 76-137-2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN and ROSENN, Circuit Judges and STERN, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 21, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 15, 1977, be, and the same is hereby affirmed as to appeal No. 77-1375. The appeal at No. 77-1376 is remanded for proceedings in accordance with the opinion of this Court.

ATTEST:

Clerk

January 5, 1978

*Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

771-520-9/0-73-111-527

UNITED STATES COURT OF APPEALS
for the Third Circuit

Nos. 77-1375
77-1376

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL BUSIC,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY LA ROCCA, JR.,

Appellant.

Appeal from the Judgment and Conviction of the United States District Court for the Western District of Pennsylvania.

SUPPLEMENTAL OPINION SUR REHEARING

(Reargued June 7, 1978)

Before Van Dusen and Rosenn, Circuit Judges, and Stern,* District Judge

Samuel J. Reich, Esquire
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Pittsburgh, Pennsylvania 15219
Attorney for Appellant Busic

Michael A. Litman, Esquire
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Blair A. Griffith
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Western District of Pennsylvania
By: Thomas A. Crawford, Jr., Esquire
Assistant U.S. Attorney
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Attorney for Appellee

APPENDIX "C"

* Herbert J. Stern, United States District Judge for the District

SUPPLEMENTAL OPINION SUR REHEARING

(Filed DEC 12 1978)

STERN,* District Judge

On the government's petition for rehearing, we reconsider our opinion in United States v. Busic, Nos. 77-1375 and 77-1376 (3rd Cir., January 5, 1978) in light of the Supreme Court's subsequent decision in Simpson v. United States, ___ U.S. ___, 46 U.S.L.W. 4159 (February 28, 1978). Although we reach the same conclusion, we do so on somewhat different grounds.

In Simpson v. United States, the Court held that a defendant may not receive consecutive sentences under section 924(c) and under the subsection of the Bank Robbery Statute, 18 U.S.C. §2113(d), which provides for an enhanced penalty where a "dangerous weapon or device" is used.[1/] The Court noted that "[c]ases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing ... raise the prospect of double jeopardy," but declined to reach the constitutional question. Instead, it based its decision on the legislative history of section 924(c), on the "policy of lenity" which in close cases counsels against the imposition of additional penalties, and on the principle of statutory construction which gives "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern ..." ___ U.S. at ___.

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

1/ 18 U.S.C. §2113(d) provides that:

> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

In light of Simpson, we conclude that we need not have reached the constitutional question in Busic, and accordingly we vacate Part II-B of our opinion. We next address two additional questions raised by Simpson: first, whether as to La Rocca, the government on resentencing is permitted to elect to proceed under either section 924(c)(1) or section 111; second, whether as to Busic, the Simpson decision prohibits the consecutive sentences under section 111 and section 924(c)(2).

We believe that the Simpson decision did not adopt the approach of the Eighth Circuit in United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977), which held that a crime for which the penalty is enhanced by use of a dangerous weapon cannot form the basis of a prosecution under section 924(c)(1). Rather, we believe that under Simpson, the government is free to prosecute under either section, provided that the defendant is not sentenced under both.[2/] We are supported in this view by Justice Brennan's closing words in Simpson: "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c)." ___ U.S. ___ (emphasis supplied). Moreover, we believe that this conclusion is consistent with the Congressional purpose of section 924(c) which, as we noted in our first opinion, was to control and severely penalize the use of firearms.[3/]

2/ Thus, since La Rocca's section 111 sentence was to run concurrently with his sentences on the other counts, should the government elect to proceed under section 924 rather than under section 111, he may receive the identical sentence which he earlier received. This would be entirely consistent with our reading of the Simpson opinion.

3/ On reargument, the government again asks that we sustain the section 924(c)(1) sentence using as a predicate La Rocca's conviction for narcotics conspiracy. Although we note that the jury was charged that it could convict La Rocca for having used a firearm during commission of either the assault or the narcotics conspiracy, we reiterate that it is impossible to ascertain on which of these felonies the jury relied. See Slip op., fn. 5.

We also believe that the Simpson opinion does not proscribe the imposition of consecutive sentences under section 111 and section 924(c)(2). We adhere to the view which we expressed in our earlier opinion, that subsection (2) of section 924 creates an entirely separate offense from that punishable under section 111, since it requires that the government prove the weapon was carried "unlawfully".[4/] The Court in Simpson, faced only with the imposition of consecutive sentences under the bank robbery statute and section 924(c)(1), had no occasion to differentiate between the two subsections of section 924(c). In view of our reading of the different Congressional purposes underlying the two subsections of section 924(c), we believe that Simpson applies only to subsection (1) of section 924(c).

Accordingly, as to Busic, we again affirm the imposition of consecutive sentences under section 924(c)(2) and section 111. La Rocca's case is remanded for resentencing, at which time the government may elect to proceed under either section 924(c)(1) or section 111, but not both.

TO THE CLERK:

Please file the foregoing supplemental opinion.

HERBERT J. STERN
District Judge

4/ We are buttressed in this view by the fact that the weapon which Busic was convicted for having "carried unlawfully", was a different weapon from that used by La Rocca in committing the underlying assault, charged to Busic pursuant to 18 U.S.C. §2. Thus, on the facts of this case, it is clear that Busic's conviction under section 924(c)(2) was for a crime completely separate from his conviction for assault with a dangerous weapon.

United States Court of Appeals

for the Third Circuit

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL

Michael N. Busic, Appellant in No. 77-1375

LA ROCCA, ANTHONY

Anthony La Rocca, Jr., Appellant in No. 77-1376

(D.C. Criminal No. 76-137-1 and 2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN and VAN DUSEN, Circuit Judges and STERN, District Judge*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was reargued by counsel on June 7, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 15, 1977, be, and the same is hereby are hereby affirmed with respect to appellant Busic and remanded for the resentencing of appellant La Rocca, at which time the government may elect to proceed under section 924 (c)(1) or section 111, but not both, all in accordance with the opinion of this Court.

ATTEST:

M. Elizabeth Ferguson

Chief Deputy Clerk

December 12, 1978

*Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

FFI-55-9-10-12-131-327

Supreme Court, U. S.
FILED
AUG 20 19
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA

No. 78-6029

ANTHONY LAROCCA, JR.,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI IN NO. 78-6020 FILED JANUARY 10, 1979; AND NO. 78-6029 FILED JANUARY 11, 1979
CERTIORARI GRANTED JUNE 4, 1979

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1976	
July 1	Indictment filed.
July 13	Plea of not guilty entered at arraignment.
	* * * * *
Aug. 16	Hearing held on pretrial motions.
Aug. 17	Order entered directing motion for severance of counts 12-16 denied; motion for severance of defendants denied; motion for change of venue held in abeyance pending voir dire of jurors.
	* * * * *
Sept. 8	Hearing held on pretrial motion for suppression.
Sept. 9	Order entered denying suppression motion. Jury selection begins for both defendants. Jury trial begins for both defendants.
Sept. 15	Jury trial concludes.
Sept. 16	Jury returns verdict on 9/15 GUILTY on counts 1-13 and count 19 as to LaRocca. GUILTY on counts 1-16 and count 18 as to Busic, NOT GUILTY on count 17.
Sept. 22	Post-trial motions for judgment of acquittal and for a new trial filed by defendant LaRocca.
	* * * * *
Oct. 28	Hearing on post-trial motions.
	* * * * *
1977	
Feb. 18	Opinion filed and order entered 2/17 denying post-trial motions.
	* * * * *
March 11	NOTICE OF APPEAL FILED from sentence dated 3/11 by defendant Busic.

DATE	PROCEEDINGS

1977

March 15 SENTENCE on 3/11:

Count 1—imprisonment 5 years; at completion of incarceration, mandatory term of 2 years special parole.

Count 2—imprisonment 5 years, with 3 years special parole supervision.

Count 3—imprisonment 5 years, with 2 years special parole.

Count 4—imprisonment 5 years, with 3 years special parole.

Count 5—imprisonment 4 years, and to run concurrently with 1, 2, 3, and 4.

Count 6—imprisonment 5 years, and to be consecutive with 1, 2, 3, 4, and 5.

Count 7—imprisonment 5 years.

Count 8—imprisonment 5 years.

Count 9—imprisonment 5 years.

Count 10—imprisonment 5 years.

Count 11—imprisonment 5 years.

Count 13—imprisonment 5 years with counts 7, 8, 9, 10, 11, 12, and 13 to run concurrently with count 6 and to be consecutive with counts 1, 2, 3, 4, and 5.

Count 14—imprisonment 2 years.

Count 15—imprisonment 2 years.

Count 16—imprisonment 2 years, with counts 14, 15, 16, to run concurrently with counts 6, 7, 8, 9, 10, 11, and 13.

Count 18—imprisonment 20 years under 18, 4205(b) (2) and to run consecutive with 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 i.e. to be consecutive to all other counts of indictment, time of 30 yrs. total. No fine; no costs.

DATE	PROCEEDINGS

1977

March 23 Cases docketed at court of appeals for Busic at 77-1375 and for LaRocca at 77-1376.

* * * * *

April 21 Final commitment of defendant Busic. (Lewisburg)

* * * * *

1978

Jan. 30 Opinion from court of appeals (1-5-78) affirming conviction of Busic and remanding LaRocca's case for resentencing on certain counts.

* * * * *

March 20 Letter from court of appeals advising rehearing is set for May 4 at 2 p.m.

* * * * *

Dec. 18 Slip opinion from U.S. Court of Appeals dated 12-12-78 affirming decision of District Court as to defendant Busic and remanding case for resentencing for defendant LaRocca (Related to opinion from court of appeals dated 1/5/78 in that opinion was reargued on June 7, 1978.)

* * * * *

1979

Jan. 5 Certified copy of judgment on rehearing with copy of opinion issued in lieu of formal mandate rec'd from U.S. Court of Appeals dated 12/12/78 affirming district court rulings as to defendant Busic and remanding the case for resentencing of defendant LaRocca. Opinion in slip opinion form. J. Stern.

Form DJ-195
(Ed. 2-7-66)

No. 76-137 Criminal

UNITED STATES District **COURT**

Western *District of* Pennsylvania

Criminal *Division*

THE UNITED STATES OF AMERICA

vs.

Michael M. Busic

Anthony LaRocca, Jr.

INDICTMENT

[illegible] & 2 (Both defendants) Conspiracy to distribute
[illegible]a and cocaine (21 USC 846)
[illegible] & 4 (Both defendants) Distributing marijuana
[illegible]caine (21 USC 841(a)(1))
[illegible] (both defendants) Using a communication facility
[illegible]rtherance of a conspiracy to distribute marijuana
[illegible]caine (21 USC 843(b)
[illegible] 2)
[illegible] & 7 (both defendants)
[illegible]ing federal agents
[illegible] 111, 1114, & 2)
[illegible] & 10 (both defendants)
[illegible]ing a silencer made
[illegible]ation of the National
[illegible] Act (26 USC 5861(c)
[illegible] USC 2)
[illegible] & 11 (both defendants)
[illegible]on of an unregistered
[illegible] (26 USC 5861(d)
[illegible] USC 2)

A true bill,

[illegible]
Foreman.

Filed in open court this ..... *day*
of ....., *A. D. 19*....

.....
Clerk.

Bail, $

BLAIR A. GRIFFITH
United States Attorney

GPO 902-482

Count 12 (LaRocca) Receiving a firearm by a convicted felon (18 USC 922(h), 924(a)
Count 13(Both defendants)Receiving a firearm by a convicted felon (18 USC 922(h) and 924(a))
Count 14 - 16 (Busic)Possession of a firearm by a convicted felon (18 USC Appendix 1202(a)(1))
Count 17 - 19 (Ct. 17 & 18 Busic) (Count 19 LaRocca) Using a firearm while committing a felony (18 USC 924(c))

PLEA

Defendant Michael M. Busic (raw) being arraigned, pleads NOT GUILTY

in open court this 13 day of JULY 19 76

Samuel Beck — Michael Busic
(Attorney for Defendant) (Defendant's signature)

1318 Barkley Rd. McKeesport
(Address) 15133

PLEA

Defendant Anthony LaRocca, Jr. (raw) being arraigned, pleads NOT GUILTY

in open court this 13 day of JULY 19 76

Richard G. Gilfillan — Anthony LaRocca, Jr.
(Attorney for Defendant) (Defendant's signature)

808 Fuck Bldg.
(Address)
Pgh Pa. 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 76-137 Criminal

(18 USC §§ 2, 111, 1114, 924(a), 922(h), 924(c), 1202(a)(1) Appendix, 21 USC §§ 846, 841(a)(1), 843(b), 26 USC §§ 5861(c), 5861(d) 5871)

UNITED STATES OF AMERICA

v.

MICHAEL M. BUSIC
ANTHONY LA ROCCA, JR.

INDICTMENT—Filed July 1, 1976

COUNT ONE

The grand jury charges:

1. That from on or about the 7th day of May, 1976, and continuously thereafter up to and including the 13th day of May, 1976, in the Western District of Pennsylvania and elsewhere, MICHAEL M. BUSIC, ANTHONY LA ROCCA, JR., the defendants herein, willfully and knowingly did combine, conspire, confederate, and agree together, and with each other, and with divers other persons whose names are to the grand jury unknown, to possess with the intent to distribute and to distribute about fifty (50) pounds of marijuana (*Cannabis Sativa L.*), a schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was a part of the said conspiracy that the defendants and their co-conspirators would obtain a large quantity of marijuana in the State of Florida.

3. It was a further part of the said conspiracy that the defendants and Charles "Chuck" Harvey—a prospec-

tive customer—would travel to Fort Lauderdale, Florida, to obtain the marijuana.

4. It was a further part of the said conspiracy that in return for $15,000.00 cash, Charles "Chuck" Harvey would receive (50) pounds of marijuana from the defendants and their co-conspirators.

5. It was a further part of the said conspiracy that the defendants and Charles "Chuck" Harvey would return to Pittsburgh, Pennsylvania, with the marijuana in order to redistribute the marijuana to BUSIC's and Harvey's customers.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed and caused to be performed, in the Western District of Pennsylvania, and elsewhere, the following overt acts:

1. On or about the 7th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

2. On or about the 8th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

3. On or about the 11th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

4. On or about the 13th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

In violation of Title 21, United States Code, Section 846.

COUNT TWO

The grand jury further charges:

1. That from on or about the 8th day of May, 1976, and continuously thereafter up to and including the 13th day of May, 1976, in the Western District of

Pennsylvania and elsewhere, MICHAEL M. BUSIC, ANTHONY LA ROCCA, JR., the defendants herein, wilfully and knowingly did combine, conspire, confederate, and agree together, and with each other, and with divers other persons whose names are to the grand jury unknown, to possess with the intent to distribute and to distribute about one (1) pound of cocaine (cocaine hydrochloride), a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was a part of the said conspiracy that the defendants and their co-conspirators would obtain a quantity of cocaine in the State of Florida.

3. It was a further part of the said conspiracy that the defendants and Charles "Chuck" Harvey—a prospective customer—would travel to Fort Lauderdale, Florida, to obtain the cocaine.

4. It was a further part of the said conspiracy that in return for $20,000.00 cash, Charles "Chuck" Harvey would receive one (1) pound of eighty percent (80%) cocaine from the defendants and their co-conspirators.

5. It was a further part of the said conspiracy that the defendants and Charles "Chuck" Harvey would return to Pittsburgh, Pennsylvania, with the cocaine in order to redistribute the cocaine to BUSIC's and Harvey's customers.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed and caused to be performed, in the Western District of Pennsylvania, and elsewhere, the following overt acts:

1. On or about the 8th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

2. On or about the 11th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LAROCCA, JR. met with Charles "Chuck" Harvey.

3. On or about the 13th day of May, 1976, in Monroeville, in the Commonwealth of Pennsylvania, MICHAEL

M. BUSIC and ANTHONY LA ROCCA, JR. met with Charles "Chuck" Harvey.

In violation of Title 21, United States Code, Section 846.

COUNT THREE

The grand jury further charges:

1. That on or about the 11th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. knowingly and intentionally did unlawfully distribute about 0.3 grams of marijuana (*Cannabis Sativa L.*), a schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

The grand jury further charges:

1. That on or about the 11th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. knowingly and intentionally did unlawfully distribute about 0.1681 grams of cocaine (cocaine hydrocloride), a schedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

The grand jury further charges:

1. That on or about the 12th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR., the defendants, knowingly and intentionally did use and cause to be used a communication facility, that is a telephone, in facilitating conspiracies to possess with the intent to distribute and to distribute about fifty (50) pounds of marijuana (*Cannabis Sativa L.*), a schedule I controlled substance and one (1) pound of cocaine (cocaine hydrochloride) a schedule II narcotic drug controlled substance, felonies under

Title 21, United States Code, Section 846, in that ANTHONY LA ROCCA, JR. used said telephone to transmit to charles "Chuck" Harvey certain arrangements for the distribution of and payment for the above described marijuana and cocaine during three (3) telephonic communications.

In violation of Title 21, United States Code, Section 843(b) and Title 18, United States Code, Section 2.

COUNT SIX

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and by means and use of a dangerous weapon, that is a semi-automatic pistol, did forcibly assault, resist, oppose, impede, intimidate and interfere with Special Agents William Alfree and William Petraitis, special agents of the Bureau of Alcohol, Tobacco, and Firearms while Special Agents Alfree and Petraitis were engaged in the performance of their official duties.

In violation of Title 18, United States Code, Sections 2, 111, 1114.

COUNT SEVEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and by means and use of a dangerous weapon, that is a semi-automatic pistol, did forcibly assault, resist, oppose, impede, intimidate and interfere with Special Agent John J. Macready, a special agent of the Drug Enforcement Administration, while Special Agent Macready was engaged in the performance of his official duties.

In violation of Title 18, United States Code, Sections 2, 111, 1114.

COUNT EIGHT

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and knowingly possessed a firearm, that is a silencer attached to a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-88304, made without the payment of a making tax as required by Section 5821, Title 26, United States Code, and made without the filing of a written application form with the Secretary of the Treasury or his delegate as required by Section 5822, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(c) and 5871, and Title 18, United States Code, Section 2.

COUNT NINE

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and knowingly possessed a firearm, that is a silencer attached to a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-88304, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(d) and 5871, and Title 18, United States Code, Section 2.

COUNT TEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and knowingly possessed a firearm, that is a silencer attached to a .22

Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-87863, made without the payment of a making tax as required by Section 5821, Title 26, United States Code, and made without the filing of a written application form with the Secretary of the Treasury or his delegate as required by Section 5822, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(c) and 5871, and Title 18, United States Code, Section 2.

COUNT ELEVEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC and ANTHONY LA ROCCA, JR. wilfully and knowingly possessed a firearm, that is a silencer attached to a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-87863, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(d) and 5871, and Title 18, United States Code, Section 2.

COUNT TWELVE

The grand jury further charges:

1. That during the period of time between the 12th day of January, 1976, and the 13th day of May, 1976, in the Western District of Pennsylvania, ANTHONY LA ROCCA, JR., having been convicted on the 16th day of March, 1970, by a Court of the Commonwealth of Pennsylvania of felonies, each punishable by imprisonment for a term exceeding one year, to wit: Traffic in Machine Guns; Assault and Battery; Pointing a Deadly Weapon; and Possession of Narcotics, and on the 12th day of December, 1973, by the United States District Court for the Western District of Pennsylvania of assaulting two (2) federal officers, stealing property of the United States

of America of a value of in excess of $100.00, and using a firearm to commit felonies prosecutable in a Court of the United States each punishable by imprisonment for a term exceeding one (1) year, did knowingly receive a firearm, that is a .380 Caliber (9mm Corto) Beretta, semi-automatic pistol bearing serial number 780-332 which had been transported in foreign commerce from Italy to the United States of America.

In violation of Title 18, United States Code, Sections 922(c) and 924(a).

COUNT THIRTEEN

The grand jury further charges:

1. That during the period of time between the 12th day of January, 1976, and the 13th day of May, 1976, in the Western District of Pennsylvania, ANTHONY LA ROCCA, JR., aided and abetted by MICHAEL M. BUSIC, having been convicted on the 16th day of March, 1970, by a Court of the Commonwealth of Pennsylvania of felonies, each punishable by imprisonment for a term exceeding one year, to wit: Traffic in Machine Guns; Assault and Battery; Pointing a Deadly Weapon; and Possession of Narcotics, and on the 12th day of December, 1973, by the United States District Court for the Western District of Pennsylvania of assaulting two (2) federal officers, stealing property of the United States of America of a value of in excess of $100.00, and using a firearm to commit felonies prosecuted in a Court of the United States, each punishable by imprisonment for a term exceeding one (1) year, did knowingly receive a firearm, that is a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic, bearing serial number 11-87863 which had been transported in interstate commerce from Southport in the State of Connecticut to New York City in the State of New York to Pittsburgh in the Commonwealth of Pennsylvania.

In violation of Title 18, United States Code, Sections 922(h) and 924(a).

COUNT FOURTEEN

The grant jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC, having been convicted on the 12th day of December, 1973, by the United States Court for the Western District of Pennsylvania of assaulting two (2) federal officers, stealing property of the United States of America of a value of in excess of $100.00, and using a firearm to commit felonies prosecutable in a Court of the United States, each punishable by imprisonment for a term exceeding one (1) year, did knowingly possess a firearm, that is a .380 Caliber (9mm Corto), Beretta, semi-automatic pistol, bearing serial number G11613, which had been transported in foreign commerce from Italy to the United States of America.

In violation of Title 18, United States Code, Appendix, Section 1202(a)(1).

COUNT FIFTEEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC, having been convicted on the 12th day of December, 1973, by the United States District Court for the Western District of Pensylvania of assaulting two (2) federal officers, stealing property of the United States of America of a value of in excess of $100.00, and using a firearm to commit felonies prosecutable in a Court of the United States, each punishable by imprisonment for a term exceeding one (1) year, did knowingly possess a firearm, that is a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-88304 which had been transported in interstate commerce from Southport in the State of Connecticut to New York City in the State of New York to Pittsburgh in the Commonwealth of Pennsylvania.

In violation of Title 18, United States Code, Appendix, Section 1202(a)(1).

COUNT SIXTEEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC, having been convicted on the 12th day of December, 1973, by the United States District Court for the Western District of Pennsylvania of assaulting two (2) federal officers, stealing property of the United States of America of a value of in excess of $100.00, and using a firearm to commit felonies prosecutable in a Court of the United States, each punishable by imprisonment for a term exceeding one (1) year, did knowingly possess a firearm, that is a .22 Caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, bearing serial number 11-87863 which had been transported in interstate commerce from Southport in the State of Connecticut to New York City in the State of New York to Pittsburgh in the Commonwealth of Pennsylvania.

In violation of Title 18, United States Code, Appendix, Section 1202(a)(1).

COUNT SEVENTEEN

The grand jury further charges:

1. That on or about the 7th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC wilfully and knowingly carried a firearm unlawfully during the commission of felonies prosecutable in a Court of the United States, that is: the distribution of marijuana in violation of Title 21, United States Code, Section 841(a)(1); a conspiracy to possess with the intent to distribute and to distribute marijuana, in violation of Title 21, United States Code, Section 846.

In violation of Title 18, United States Code, Section 924(c).

COUNT EIGHTEEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, MICHAEL M. BUSIC wilfully and knowingly carried a firearm unlawfully during the commission of felonies prosecutable in a Court of the United States, that is: conspiracies to possess with the intent to distribute and to distribute marijuana and cocaine, in violation of Title 21, United States Code, Section 846; assaulting federal officers, in violation of Title 18, United States Code, Section 111.

In violation of Title 18, United States Code, Section 924(c).

COUNT NINETEEN

The grand jury further charges:

1. That on or about the 13th day of May, 1976, in the Western District of Pennsylvania, ANTHONY LA ROCCA, JR., wilfully and knowingly used a firearm to commit felonies prosecutable in a Court of the United States, that is: conspiracies to possess with the intent to distribute and to distribute marijuana and cocaine, in violation of Title 21, United States Code, Section 846; assaulting federal officers, in violation of Title 18, United States Code, Section 111.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,

/s/ Charles Pascoe
Foreman

/s/ Blair A. Griffith
BLAIR A. GRIFFITH
United States Attorney

/s/ Thomas A. Crawford, Jr.
THOMAS A. CRAWFORD, JR.
Special Attorney
United States Department of Justice

I certify that I have been advised by the magistrate that all pretrial motions must be filed within ten days of arraignment unless the Court extends the time upon written application made within the said ten day period.

/s/ [Illegible]
Attorney for Defendant Busic

/s/ [Illegible]
Attorney for Defendant
LaRocca

Florence Jones, Courtrepo[illegible]

United States of America vs

United States District Court for

DEFENDANT: (1) MICHAEL M. BUSIC

WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO.: 76-137 CRIMINAL ACTION

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: MARCH DAY: 11, YEAR: 1977.

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Samuel J. Reich, Esq. (Appointed)
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of { [ ] NOT GUILTY. Defendant is discharged; [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute marijuana and cocaine (21 U.S.C., Sec. 846) - COUNTS 1 and 2. Distributing marijuana and cocaine (21 U.S.C.,Sec. 841(a)(1) - COUNTS 3 and 4. Using a communication facility in furtherance of a conspiracy to distribute marijuana and cocaine(21U.S.C.,Sec.843(b); 18 U.S.C 2) - COUNT 5. Assaulting federal agents (18 U.S.C., Sec.,111,1114 and 2) - COUNTS 6 and 7. Possessing a silencer made in violation of the National Firearms Act.(26 U.S.C 5861(c) 5871, 18 U.S.C., Sec. 2) - COUNTS 8 and 10. Possession of an unregistered silencer(26 U.S.C., Sec.5861(d) 5871, 18 U.S.C., Sec. 2) - COUNTS 9 and 11. Receiving a firearm by a convicted felon(18 U.S.C.,Sec.922(h) - COUNT 13 (CONTINUED PAGE TWO - -

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five(5) years as to COUNT 1 of the Indictment and at the completion of incarceration a mandatory term of two(2) years of special parole supervision is hereby imposed.

COUNT 2: defendant is committed to the custody of the Attorney General for a period of five(5) years and at the completion of incarceration a mandatory term of three(3) years of special parole supervision is hereby imposed.

COUNT 3: defendant is committed to the custody of the Attorney General for a period of five(5) years and at the completion of incarceration a mandatory term of two(2) years of special parole supervision is hereby imposed.

COUNT 4: defendant is committed to the custody of the Attorney General for a period of five(5) years and at the completion of incarceration a mandatory term of three(3)years of special parole supervision is hereby imposed.

SPECIAL CONDITIONS OF PROBATION

COUNT 5: defendant is committed to the custody of the Attorney General for a period of four(4) years with the sentences imposed in COUNTS 1,2,3,4 and 5 to run concurrently.

COUNT 6: defendant is committed to the custody of the Attorney General for a period of five(5) years to be consecutive with the sentence imposed in COUNTS 1,2,3,4 and 5.

COUNT 7: defendant is committed to the custody of the Attorney General for a period of five(5) years.

COUNT 8: defendant is committed to the custody of the Attorney General for a period of five(5) years.

COUNT 9: defendant is committed to the custody of the Attorney General for a period of five(5) years.

(CONTINUED ON PAGE TWO) - - - - -

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

Date

United States of America vs.

United States District Court for

DEFENDANT (1) MICHAEL M. BUSIC

WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 76-137 CRIMINAL ACTION

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: MARCH DAY: 11, YEAR: 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Samuel J. Reich, Esq. (Appointed)
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of (CONTINUED FROM PAGE ONE) - - - Possession of a firearm by a convicted felon (18 U.S.C.,Appendix 1202(a)(1) - COUNTS 14 and 16. Assaulting two(2) federal officers, stealing property of the U. S. of a value in excess of $100.00, and using a firearm to commit felonies (18 U.S.C., A pendix, Sec. 1202(a)(1) - COUNT 15. Carrying a firearm during a conspiracy (18 U.S.C., Sec. 924(c) - COUNT 18.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 10: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 11: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 13: defendant is committed to the custody of the Attorney General for a period of five(5) years, with COUNTS 7,8,9,10,11,12,13 to be concurrent with the sentence imposed in COUNT 6 and to be consecutive with the sentence imposed at COUNTS 1,2,3,4 and 5 of the Indictment.
COUNT 14: defendant is committed to the custody of the Attorney General for a period of two(2) years.
COUNT 15: defendant is committed to the custody of the Attorney General for a period of two(2) years.
COUNT 16: defendant is committed to the custody of the Attorney General for a period of two(2) years, with COUNTS 14,15 and 16 to be concurrent with COUNTS 6,7,8,9,10,11 and 13.
COUNT 18: defendant is committed to the custody of the Attorney General for a period of twenty(20) years pursuant to the provisions of 18 U.S.C.A.,Section 4205(b)(2) and to run consecutive with COUNTS 1,2,3,4 and 5 and 6,7,8,9,10,11 and 13, i.e., to be consecutive to all other Counts of the Indictment, making a total time of thirty (30) years.
No fine. No costs.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Date March 11, 1977

United States of America vs.

United States District Court for

DEFENDANT: (2) ANTHONY LA ROCCA, JR.,

WESTERN DISTRICT OF PENNSYLVANIA

MAR 3 1977
JACK L. WAGNER
CLERK, U. S. DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO.: 76-137 CRIMINAL ACTION

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: MARCH DAY: 11, YEAR: 1977.

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Michael A. Litman, Esq. (Appointed).
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Conspiracy to distribute marijuana and cocaine (21 U.S.C., Sec. 846) - COUNTS 1 and 2. Distributing marijuana and cocaine (21 U.S.C., Sec. 841(a) (1) - COUNTS 3 and 4. Using a communication facility in furtherance of a conspiracy to distributemarijuana and cocaine(21U.S.C.,Sec.843(b) and 18 U.S.C., Section 2) - COUNT 5. Assaulting federal agents 18 U.S.C., Sec. 111,1114 and 2) COUNTS 6 and 7. Possessing a silencer made in viol. of National Firearms Act (26 U.S.C., Sec. 5861(c) 5871 and 18 U.S.C., Sec. 2) - COUNTS 8 and 10. Possession of an unregistered silencer (26 U.S.C.,Sec. 5861(d) 5671, 18 U.S.C. Sec. 2) - COUNTS 9 and 11. (CONTINUED ON PAGE TWO - - - - - - - - - -)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five(5) year as to Count 1 of the Indictment and at the completion of incarceration a mandatory term of two (2) years of special parole supervision is hereby imposed.
Count 2: defendant is committed to the custody of the Attorney General for a period of five (5) years and at the completion of incarceration a mandatory term of three(3) year of special parole supervision is hereby imposed.
COUNT 3: defendant is committed to the custody of the Attorney General for a period of five(5) years and at the completion of incarceration a mandatory term of two (2) years of special parole supervision is hereby imposed.
COUNT 4: defendant is committed to the custody of the Attorney General for a period of five(5) years and at the completion of incarceration a mandatory term of three(3)years of special parole supervision is hereby imposed.

SPECIAL CONDITIONS OF PROBATION

COUNT 5: defendant is committed to the custody of the Attorney General for a period of four(4) years with the sentences imposed in Counts 1,2,3,4 and 5 to run concurrently.

COUNT 6: defendant is committed to the custody of the Attorney General for a period of five(5) years to be consecutive with the sentence imposed in Counts 1,2,3,4 and 5.

COUNT 7: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 8:defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 9: defendant is committed to the custody of the Attorney General for a period of five(5) years.

ADDITIONAL CONDITIONS OF PROBATION

(CONTINUED ON PAGE TWO) - - - - - - -

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

FILED

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

Date

19

DOCKET NO. 76-137 CRIMINAL ACTION

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
MARCH	11,	1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Michael A. Litman, Esq. (Appointed)
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of (CONTINUED FROM PAGE ONE) - - Receiving a firearm by a convicted felon (18 U.S.C., Sec. 922(h)m 924(a) - COUNT 12. Receiving a firearm by a convicted felon (18 U.S.C., Section 922(h) and 924(a) - COUNT 13. Using a firearm while committing a felony 18 U.S.C., Section 924(c) - COUNT 19.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 10: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 11: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 12: defendant is committed to the custody of the Attorney General for a period of five(5) years.
COUNT 13: defendant is committed to the custody of the Attorney General for a period of five(5) years, with COUNTS 7,8,9,10,11,12,13 to be concurrent with the sentence imposed in COUNT 6 and to be consecutive with the sentence imposed at COUNTS 1,2,3,4 and 5 of the Indictment.

SPECIAL CONDITIONS OF PROBATION

COUNT 19: defendant is committed to the custody of the Attorney General for a period of twenty(20) years pursuant to the provisions 18 U.S.C.A., Section 4205(b)(2) and to run consecutive with COUNTS 1,2,3,4 and 5 and 6,7,8,9,10,11,12 and 13 of the Indictment making a total time of thirty(30) years.

No fine. No costs.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

FILED

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

/s/ James A. Belanger

Date March 11, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 76-137

UNITED STATES OF AMERICA

vs.

MICHAEL M. BUSIC and
ANTHONY LAROCCA, JR., DEFENDANTS

OPINION

BARRON P. McCUNE, District Judge

February 17, 1977.

On July 1, 1976, a 19-count indictment was returned by the Federal Grand Jury of this district charging the defendants, Michael M. Busic and Anthony LaRocca, Jr., with various offenses: conspiracy to possess and distribute about fifty pounds of marijuana (Count 1) and one pound of cocaine (Count 2); the distribution of 0.3 grams of marijuana (Count 3) and 0.1681 grams of cocaine (Count 4); using a communication facility (a telephone) to facilitate the distribution of the above substances (Count 5); and various weapons offenses and gun possession violations (Counts 6-19).[1] These charges arose out of a drug conspiracy and subsequent shoot-out with federal agents at the Miracle Mile Shopping Center, Monroeville, Pennsylvania, which took place on May 13, 1976.

The defendants were tried on these charges before a jury of this district and were found guilty[2] on September 15, 1976.

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[1] Of these counts, 7 (Counts 6-11, 13) applied to both defendants 2 (Counts 12 and 19) applied to LaRocca only, and 5 (Counts 14-18) applied to Busic only.

[2] The defendant, LaRocca, was found guilty on all 14 charges brought against him. The defendant, Busic, was found guilty on 16 of 17 charges brought against him. Busic was found not guilty as to Count 17 of the indictment which charged a violation of 18 U.S.C. Sec. 924(c).

Presently before the court are the defendant's motions for Judgment of Acquittal and New Trial. After a thorough consideration of the briefs submitted by the respective parties, and following oral argument, we will deny the motions.

The evidence presented by the Government during the trial consisted of the testimony of those federal agents who were involved in an investigation into the defendants' alleged drug dealings and who were also present at the May 13, 1976 shoot-out. The Government's chief witness was Charles D. Harvey, an undercover agent with the Drug Enforcement Administration, Joint Narcotics Task Force.

Agent Harvey testified [3] that he first met with the defendants in the late afternoon of May 7, 1976, at the Monroeville apartment of Richard Hervaux, a government informant. During that meeting it was agreed that Harvey would serve as a driver and would transport a quantity of marijuana from Florida to Pittsburgh for an intended distribution in this area. The next evening, May 8, 1976, a second meeting took place in Hervaux's apartment at which time the defendant, Busic, did not appear. At this meeting various prices for bales of marijuana and a pound of cocaine were discussed between Harvey and LaRocca.

Harvey did not meet with the defendants again until the evening of May 11, 1976, at which time Harvey was given samples of cocaine and marijuana which he took to the Allegheny County Crime Lab for analysis.

On May 12, 1976, LaRocca telephoned Harvey on two occasions. During one of the calls LaRocca supplied Harvey with a phone number in Florida so that Harvey could check the final arrangements for closing the deal. By the time of the second call, Harvey had booked a flight to Florida under a fictitious name and communi-

[3] Portions of Harvey's testimony were substantiated by agents William J. Petraitis, William F. Alfree and John J. Macready, all of whom were present at the scene of the shoot-out on May 13, 1976.

cated this to LaRocca. Later that day, at 5:30 P.M., Harvey called LaRocca and was informed by LaRocca that he wanted to see the "purchase money" prior to Harvey's trip. Harvey agreed to meet LaRocca the next day and show him the money.

Further, LaRocca instructed Harvey to call one, "Lewis", in Florida later that evening who would tell Harvey if all arrangements were in readiness. Harvey placed the call at 10:05 P.M. that night and the arrangements were confirmed.

On May 13, 1976, pursuant to LaRocca's request, Harvey called LaRocca at approximately 11:30 A.M., and informed LaRocca that he had acquired the money and would show LaRocca the money. They arranged to meet in the Miracle Mile Shopping Center in Monroeville, Pennsylvania, that afternoon. Pursuant to this arrangement, Harvey drove there alone (with surveillance units in support) and arrived at the designated location around 1:00 P.M. He had $30,000 of government money with him in a brown paper bag locked in his trunk. LaRocca and Busic arrived in LaRocca's car.

Harvey parked his car in the parking lot of the shopping center and the defendants pulled beside him and parked. Harvey then drove his car away from LaRocca's to a distance of "one-half block" away. Harvey then left LaRocca's car, as did LaRocca, and they met approximately half-way between the two cars. Together they walked to Harvey's car and entered it and Harvey drove to the far end of the parking lot. During this time, LaRocca, upon Harvey's request, took off his jacket and laid it on the front seat between them. After they stopped, both Harvey and LaRocca got out of the car. Harvey opened the trunk and the bag, and showed the money to LaRocca. They then re-entered Harvey's car and proceeded toward LaRocca's car. At this point, Harvey stated that he glanced down at the seat and noticed "a revolver or a pistol" sticking out from under LaRocca's jacket. Harvey again parked about one-half block away from LaRocca's car for "safety" reasons. LaRocca then went for his weapon which caused Harvey to

jump from his car and walk rapidly away from it. LaRocca chased him with his coat wrapped around the gun which he held, caught Harvey, cocked the gun, stuck it "in (Harvey's) chest" and demanded the money. La Rocca took Harvey's keys, opened the trunk, took the bag containing the money and backed away from Harvey intending to return to his car.

At that point, Harvey gave a pre-arranged signal to the other agents [4] serving as surveillance units in this area who began to close in on LaRocca. Five shots were fired by LaRocca: one at Harvey, three at Macready and Ferrara's vehicle, two of which struck the passenger door; and one at Petraitis and Alfree's vehicle, which skimmed off the hood of the car and struck the windshild "head high." Within moments, LaRocca was arrested.[5]

During this time, Busic was not involved in the gun fire. He testified that he had been in the shopping center purchasing a pack of cigarettes.[6] He was arrested in the parking lot. A Beretta was found in his possession. Prior to his arrest he stated: "Just remember that I didn't shoot at anybody and I didn't draw my gun."

After the arrests were made, agent Petraitis looked into LaRocca's car and observed a black briefcase, which was open, on the floor in front of the passenger's seat. Upon an inspection of the briefcase, he discovered a semi-automatic Ruger pistol with a large cylinder (silencer) attached to the muzzle. Also found in the briefcase were two full magazines and a plastic box

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[4] The other agents were: Petraitis and Alfree; Morgan and Tate; and Macready and Ferrara.

[5] The gun which LaRocca was using was a .330 caliber Beretta which had a capacity of seven rounds. Upon analysis, it was determined that five rounds were fired, two rounds remained in the gun, and it remained cocked and ready to fire. Three shell casings were also found in the parking lot. One round was removed from a Lincoln Continental parked nearby.

[6] This aspect of the evidence was not conclusively proven through the testimony of Mary Lou Caliguri, a cashier at the Thrift Drug Store, Miracle Mile Shopping Center, Monroeville, Pennsylvania (TT. 378-380), although Busic so testified (TT. 410-411).

containing ammunition. The next day, an inventory search of the automobile was conducted. A box of .83 caliber ammunition was found in the glove compartment, and blackjacks and "noon choca" sticks were found in the trunk. Another Ruger, with a silencer attached, was found on the floor of the automobile under the driver's seat.

The defendant, Busic, testified on his own behalf to the effect that Richard Hervaux [7] initiated the narcotics deal with the sole purpose of stealing the "front money" from Harvey, and represented to agent Harvey that the defendants were representatives of a drug dealer in Florida. Further, Busic testified that by May 12, 1976, he and LaRocca had decided to back out of the deal but Hervaux was persistent about them going to the shopping center on the 13th in order to take the money from Harvey. In effect, Busic attempted by his testimony to show that he and LaRocca were victims of the Government's entrapment perpetrated by agent Harvey and the informer, Hervaux.

This entrapment defense was contradicted by the Government's rebuttal witness, Curwood Masters, a special agent for the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, who testified that from 8:10 P.M. until 9:15 P.M. on May 5, 1976, two days prior to Harvey's initial meeting with the defendants, he was forced to hide in the closet of Hervaux's apartment (when he happened to be there when LaRocca unexpectedly dropped in) and while so located, overheard a conversation between LaRocca and Hervaux. He testified that LaRocca, and not Hervaux, initiated a conversation concerning narcotics and that LaRocca ap-

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[7] Hervaux was not called by either the government or the defendant. Fred C. Koerhner, the court-appointed private investigator for Busic stated that he knew Hervaux's address, had been to his apartment twice, that Hervaux had tried to call Koerhner without success and Koerhner had been unable to serve a subpoena. However, although he had been appointed during the first week of August, 1976, he had not tried to serve a subpoena until Friday, September 10, 1976, after trial was underway. Trial began September 3, 1976. Koerhner tried again Sunday night, September 12, 1976.

proached Hervaux about buying marijuana at that time.

With this factual background established, we turn to a consideration of the various arguments advanced by the respective defendants.

Pretrial Rulings

With regard to this court's pretrial rulings, defendants advance three contentions. First, both defendants allege that this court's refusal to sever the trials of the defendants constituted error. Second, they allege error in this court's refusal to sever their trial on firearms charges from the other counts of the indictment, thereby permitting the Government to prove both defendants' prior criminal convictions. Thirdly, they contend that this court erred in refusing to grant a continuance to them when the court-appointed investigator required additional time to track down recently discovered leads bearing on their entrapment defense. We disagree with all of the above contentions.

The tests for joinder of counts and defendants are found in Rule 8(b) of the Federal Rules of Criminal Procedure. See, *United States* v. *Somers*, 496 F.2d 723, 729, fn. 8 (3d Cir. 1974), cert. den. 419 U.S. 832, 95 S. Ct. 56, 42 L. Ed. 2d 58 (1974) Rule 8(b) provides:

> "(b). Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The severance of offenses or defendants is a matter committed to the discretion of the trial court and will not be distributed absent a clear showing that this court abused that discretion. *United States* v. *Armocida*, 515 F.2d 29, 46 (3d Cir. 1975), cert. den., 423 U.S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84 (1975).

In the instant case, the various criminal acts, including the firearms violations, charged in the indictment

which were supported by the evidence, revealed a common criminal scheme in which the defendants jointly participated. Thus, this court properly exercised its discretion in permitting the counts and the defendants to be tried together. See, *United States* v. *Stringi???*, 378 F. 2d 896 (3d Cir. 1967), cert. den. 389 U.S. 846, 88 S. Ct. 100, 19 L. Ed. 2d 113 (1967).

Defendants' third contention is likewise without merit for two reasons. First, Fred C. Koerhner, the court-appointed private investigator for the defendant, Busic, had all of a month to investigate and was permitted to continue his investigation during the defendants' trial (TT.6). Although he was unsuccessful in serving Richard Hervaux, he did not try to serve him until trial was underway. Second, the entrapment defense was sufficiently raised by Busic's testimony without Koerhner's investigatory assistance. Hervaux was an informant but he was well known to both defendants.[7a] Further, we were required to try defendants speedily.

The Conspiracy Counts

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the Government at trial was legally insufficient to establish the existence of a conspiracy as charged in Counts 1 and 2 of the indictment. We disagree. As to Counts 1 and 2, a review of the record reveals that the evidence presented was more than sufficient to establish that a conspiracy to distribute drugs existed. Agent Harvey's testimony, as substantially summarized, *supra*, clearly reveals that the defendants did meet and conspire together, from May 7, 1976, to May 13, 1976, for the purpose of ultimately possessing and distributing certain drugs for their own profit.

As to Count 5, defendants contend that since the drug transactions were never completed, 21 U.S.C. Sec. 843

[7a] Hervaux is a motorcycle dealer. Incidentally, Curwood Masters had gone to Hervaux's apartment to discuss a motorcycle.

(b)[8] was not violated. In support they cite *United States* v. *Leslie*, 411 F.Supp. 215 (D. Del., 1976). Our research indicates that this is the only case to date which has discussed this particular issue. However, we cannot agree with the decision of that court. In Count 5, certain violations of 21 U.S.C. Sec. 846 were alleged. These violations of Sec. 846 are felonies within the meaning of Sec. 843(b). Thus, although actual distribution never took place, the evidence was sufficient to show that certain acts proscribed by Sec. 846 and punishable under Sec. 843(b), took place, and, therefore, Sec. 843(b) was violated. See *United States* v. *Turner*, 528 F.2d 143, 165 (9th Cir. 1975). We, therefore, find no merit in defendants' arguments as to the charges contained in Counts 1, 2 and 5.

Firearms Violations

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the Government at trial was legally insufficient to establish their guilt on the firearms violations as charged in Counts 13-16 of the indictment. They contend that, as to all of these counts, the evidence failed to establish a sufficient nexus with foreign and/or interstate commerce. Further, with regard to Count 13, they contend that the evidence failed to establish (1) that LaRocca was aided and abetted by Busic in receiving a firearm, and (2) the time and venue of LaRocca's receipt of the firearm. We must disagree with the above contentions.

[8] Section 843(b) of Title 21 of the United States Code provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of *any act or acts* constituting a *felony* under any provision of (Title 21, respecting Drug Abuse Prevention and Control). . . . Each separate use of a communication facility shall be a separate offense under this section. . . . (T)he term "communication facility" . . . includes . . . (the) telephone . . ." (Emphasis supplied).

Count 13 charged violations of 18 U.S.C. Sections 922(h)[9] and 924(a),[10] arising out of LaRocca's receipt (aided and abetted by Busic) of a .22 caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, serial number 11-87863, which had been transported in interstate commerce. His receipt of this pistol occurred subsequent to two convictions of March 16, 1970 and December 12, 1973, and his release from prison on January 12, 1976.

The record reveals that Busic purchased this pistol on April 5, 1973, from Gerald Braverman, Vice-President of Braverman Arms Company, Wilkinsburg, Pennsylvania (TT. 98), and that this pistol was manufactured in Southport, Connecticut (TT. 99). Subsequent to Busic's purchase of this pistol, this weapon was found in LaRocca's possession. The evidence thus revealed that LaRocca received this weapon after its interstate shipment and within the Western District of Pennsylvania. We believe that this evidence was sufficient to show the time and venue of receipt by LaRocca of this weapon.

Counts 14 through 16 applied to Busic only and charged violations of 18 U.S.C. Sec. 1202(a)(1).[11] Count 14 concerned Busic's possession of a Beretta which he

[9] Section 922(h) provides, in pertinent part:

"(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm or ammunition which has been shipped or transported interstate or foreign commerce."

[10] Section 924(a) provides, in pertinent part:

"(a) Whoever violates any provision of this chapter . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both. . . ."

[11] Section 1202(a)(1) provides:

"(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

was carrying at the time of his arrest. Counts 15 and 16 concern his possession of two Strum-Ruger pistols. As to these three counts, Busic contends that there was no showing of a recent interstate nexus as to the offense of possessing as required by *United States* v. *Bass*, 404 U.S. 336 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

It is clear that with regard to Counts 14-16, Busic's conviction cannot stand unless an interstate nexus is shown. *United States* v. *Bass*, *supra*. Our research of the law reveals that the Third Circuit has not (to date) discussed or ruled upon the "possession" offense of Sec. 1202(a)(1). However, on two occasions courts of this district has addressed this issue. *United States* v. *Graves*, 394 F. Supp. 429, 434 (W.D. Pa. 1975); *United States* v. *Letky*, 371 F. Supp. 1236, 1289-90 (W.D. Pa. 1974). In both cases it was noted, citing *Bass*, that as to the offense of possessing, the interstate commerce requirement is satisfied if it is shown that at the time of the possession, the firearm was moving interstate, or on an interstate facility, or if the possession affected commerce. Further, both of these cases held that this interstate commerce requirement was met by proof that at anytime prior to possession the firearm had traveled in interstate commerce. We believe that the evidence presented by the Government at trial was sufficient to satisfy the interstate commerce requirement enunciated in *Bass*, and set forth in cases within this District.

Assault Charges

Busic contends in his motion for Judgment of Acquittal that the evidence was legally insufficient to establish his participation with LaRocca in the assaults on the federal officers who were involved in the shoot-out of May 13, 1976, as charged in Counts 6 and 7 of the indictment, in violation of 18 U.S.C. Sections 2, 111, 1114.

Busic argues that when the defendants went to the shopping center on May 13, 1976, for the purpose of robbing Harvey, only LaRocca perpetrated the actual assault on Harvey and the other supporting agents; and that Busic never participated in these actions, nor did he draw or fire his weapon. Thus, he argues that al-

though the evidence supports a finding of a conspiracy by LaRocca and Busic to rob and assault Harvey, it does not support a finding that he conspired with LaRocca to assault the other officers present at the scene. Therefore, he asserts that it was error for this court to charge the jury under *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), that these "additional" assaults were in furtherance of their original conspiracy to possess and distribute drugs. We disagree.

We believe that LaRocca's acts are attributable to Busic. The evidence is clear that the defendants conspired and made arrangements with certain individuals in Florida to obtain a certain quantity of marijuana and cocaine for the purpose of distributing these drugs in the Pittsburgh area. Agent Harvey was originally asked to transport these narcotics for them from Florida to Pittsburgh. After Harvey showed an interest in possibly obtaining a quantity of these drugs and offered a sum of money for their purchase, the defendants conceived of a scheme to rob Harvey on May 13, 1976.

To say that their assault on the federal officers was not in furtherance of their original conspiracy relating to the obtaining and distributing of drugs is completely contrary to the evidence presented. Harvey was present at the shopping center only for the purpose of showing them the "front money" for the purchase of the discussed drugs. The arrangements for the sale, the Florida trip and the notice of the trip to the defendants' drug connection in Florida had been made. All that was left to be performed was the trip itself and the payment by Harvey. At any rate, the cash which Harvey brought with him that day was to be used for the intended purpose of purchasing the drugs previously discussed. Harvey, himself, was not certain that a robbery was to occur, but he was required to protect himself and the government money. Clearly, the evidence presented a continuing conspiracy, and the intended robbery of Harvey by the defendants on May 13, 1976, was in furtherance of their original drug conspiracy. Therefore, although Busic did not physically participate in the shoot-out and assaults, he was and remained as much a part

of the original conspiracy as was LaRocca, and is, thus, just as responsible for the actions of LaRocca in the assaults on the other federal officers involved as LaRocca is. The jury was entitled to infer that if defendants had stolen the money they could have used it to buy the drugs for themselves.

For these reasons, we likewise find no merit in Busic's argument that the evidence was insufficient to establish that he unlawfully possessed a firearm and participated in the various felonies, including the assaults on the federal officers, as charged in Count 18 of the indictment, which charged a violation of 18 U.S.C. Sec. 924(c), a separate offense which forbids the carrying of a firearm during the commission of any felony prosecutable in federal court.

Entrapment

The defendants' arguments in support of this defense revolve around the actions of the government's informant, Richard Hervaux, prior to May 13, 1976. During the various meetings involving the defendants and agent Harvey, which took place in Hervaux's apartment, Hervaux was always present.

In support of an entrapment defense, Busic advances the following argument: that he testified that it was Hervaux that conceived the plan to rob Harvey on May 13th under the pretext of selling him drugs, and that Hervaux, not the defendants, provided the quantities of marijuana and cocaine which were given to Harvey; moreover, although Busic readily admitted a plan to rob Harvey, he continually denied that he was involved in a scheme to transport and sell large quantities of cocaine and marijuana from Florida. We find no merit in these arguments.

The most recent pronouncement by the Supreme Court concerning the defense of entrapment is found in *Hampton* v. *United States*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), wherein the following is stated:

> "If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ,' the defendant is protected by the defense of entrapment."

425 U.S. 490, 96 S. Ct. 1650. This court properly charged on entrapment in the manner set forth in 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, Sec. 13.13 (2d Ed. 1970, 1975 Supplement) which was cited with apparent approval by this Circuit in *United States* v. *Silver*, 457 F.2d 1217, 1220 (3d Cir. 1972), and later expressly approved in *Government of Virgin Islands* v. *Cruz*, 478 F.2d 712, 717, n.5 (3d Cir. 1973), and *United States* v. *Watson*, 489 F.2d 504, 506 (3d Cir. 1973).

The jury had ample evidence before it that the defendant, LaRocca, initially approached Hervaux on May 5, 1976, concerning a possible purchase of marijuana. When Busic entered into negotiations and discussions which began on May 7, 1976, and lated through May 12, 1976, their contract in Florida had been established and all plans had been made for Harvey's trip to Florida to obtain quantities of marijuana and cocaine and distribution of these drugs in this area. Although Busic testified that Hervaux initiated the discussions concerning the drugs, the testimony of Curwood Masters sufficiently rebutted this line of testimony and the jury was justified in believing that the defendants had the predisposition to devise the scheme for the drug purchase and carry out plans to that end. Therefore, the defendants' entrapment arguments are without merit.

Jury Charge

Both defendants advance three essential arguments on their post-trial motions. First, they contend that the court incorrectly charged the jury regarding the firearms charges involving their movement in interstate commerce by stating that this element was satisfied if the evidence showed movement in foreign or interstate commerce at any time. Second, they contend that the court erred in refusing to charge the jury regarding the Government's failure to call Richard Hervaux, a government inform-

ant and essential witness, who was peculiarly under the Government's control. Thirdly, Busic contends that with regard to the assault charges, this court erroneously charged the jury to the effect that he was guilty of the assaults if he went to the shopping center as part of a conspiracy to rob Harvey and did not withdraw. LaRocca advanced a similar argument with regard to the conspiracy charges against him, namely that this court erroneously charged the jury that a conspiracy to rob Harvey was merely a continuation of an ongoing conspiracy to distribute drugs. We are compelled to reject the first and third arguments for the reasons stated earlier in this opinion.

Only the second argument deserves a brief comment here. Hervaux would have indeed been an important witness in this case. However, he was not, as defendants contend, peculiarly under the Government's control. He was available to be called by either party. In fact, the defendants knew his address and, through Koerhner, attempted to subpoena him without success. We do not believe that the Government's failure to call Hervaux as a witness, therefore, justified a charge to the effect that Hervaux's testimony would have been adverse to the Government if he had been called. We thus find no merit in this argument by defendants.

We likewise find no merit in the defendants' remaining contentions, and therefore dismiss their motions for Judgment of Acquittal and New Trial.

An appropriate order follows.

/s/ Barron P. McCune
BARRON P. MCCUNE
United States District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 76-137

UNITED STATES OF AMERICA

vs.

MICHAEL M. BUSIC, and
ANTHONY LAROCCA, JR., DEFENDANTS

ORDER

AND NOW, February 17, 1977, the defendants' Motion for Judgment of Acquittal and New Trial are hereby denied. Imposition of sentence is fixed for March 11, 1977, at 3:00 P.M. in Court Room No. 10.

/s/ Barron P. McCune
BARRON P. MCCUNE
United States District Judge

cc: Thomas A. Crawford, A.U.S.A.
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375
77-1376

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL BUSIC, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY LA ROCCA, JR., APPELLANT

Appeal from the Judgment and Conviction
of the United States District Court
for the Western District of Pennsylvania.

Argued October 21, 1977

Before Van Dusen and Rosenn, *Circuit Judges*,
and Stern,* *District Judge*

---

* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

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Western District of Pennsylvania
By: Thomas A. Crawford, Jr.,
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Attorney for Appellees

OPINION OF THE COURT

(Filed Jan. 5, 1978)

STERN, District Judge

On this appeal we must decide whether a defendant may receive consecutive sentences for the crime of assault with a dangerous weapon [18 U.S.C. § 111] and the crime of use of a firearms to commit that felony [18 U.S.C. § 924(c)(1)], where the dangerous weapon used in the assault is a firearm. We hold that such sentencing violates the double jeopardy clause and we remand La Rocca's case to the district court for resentencing.

Defendants also cite as error the trial court's refusal to sever for trial those counts of the indictment which required proof of defendants' prior felony convictions. We hold that, on the facts of this case, the refusal to sever those counts was harmless error. The other challenges raised by defendants, including the contention that the trial court erred in refusing to give a "missing witness"

instruction, we find to be without merit and, thus, we affirm defendants' convictions in all other respects.

I.

As the record at trial reveals, Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob "front money" from an undercover agent. This attempted robbery culminated in a shootout with federal agents.

On this appeal, we must view the evidence in the light most favorable to the government. *See Glasser* v. *United States*, 315 U.S. 60 (1942). Thus viewed, the evidence might be summarized as follows. Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some "front money". A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William

Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment. (Tr. 44).

In addition to evidence regarding the conspiracy and subsequent shootout, the government also introduced in its case-in-chief evidence of defendants' prior convictions for the purpose of proving that defendants were convicted felons and, thus, had received firearms in violation of 18 U.S.C. § 922(h). Counsel for the defendants stipulated that Busic and La Rocca had been jointly convicted in 1973 for assault on two federal officers, theft of government property and use of a firearm to commit these felonies. These convictions were introduced through the testimony of agent Petraitis and the actual certificates of conviction, althouh the government was not permitted to elicit the facts underlying these convictions. (Tr. 195).

Defendants raised the defense of entrapment. Busic took the stand on his own behalf, claiming that Hervaux had initiated the scheme to rob Harvey and further claiming that, despite his and La Rocca's efforts to back out of the scheme, Hervaux had urged them on. (Tr. 388-414). La Rocca did not himself testify, but called his commonlaw wife, Janna K. Sam, who testified that La Rocca avoided the repeated phone calls he received from Hervaux during the time period in question. (Tr. 470-472) In addition, defendants attempted to show the unavailability of Richard Hervaux, through the testimony of their court-appointed investigator, Fred Koerhner, who testified that he had twice attempted, unsuccessfully, to serve Hervaux. (Tr. 381). At this time, the

government offered itself to serve Hervaux, but defense counsel declined the offer. (Tr. 385-386). Defendants requested, and were denied, a "missing witness instruction" which would have instruced the jury that it was entitled to draw an adverse inference based on the government's failure to call Hervaux to the stand.

The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. § 924: La Rocca for having *used* a firearm to commit the drug conspiracy and assaults on federal officers, in violation of § 924(c)(1); Busic for having *carried* a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. § 924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the § 924 counts—all to run consecutively to each other—for a total of 30 years for each defendant.

Defendants' first and most formidable challenge is directed at 18 U.S.C. § 924. That statute penalizes a person who either:

> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, *or*
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

18 U.S.C. § 924(c) (Emphasis supplied). The statute further provides for a mandatory sentence of one-to-ten years for first offenders, and two-to-twenty-five years for subsequent offenders.[1]

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[1] The full text of 18 U.S.C. § 924(c) provides as follows:

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment for the commission of such felony.

Busic was indicted, convicted and sentenced under subsection (2) of this statute for having carried a firearm unlawfully during the commission of two federal felonies: drug conspiracy and assault on federal officers; La Rocca was indicted, convicted and sentenced under subsection (1) for having used a firearm to commit these same felonies. In addition, each defendant received consecutive sentences under the enhanced penalty provision of 18 U.S.C. § 111 for having assaulted federal officers with a "dangerous or deadly weapon." [2]

A

Defendants argue that conspiracies to commit drug offenses (21 U.S.C. § 846) and assaults on federal officers (18 U.S.C. § 111) are not "felonies" within the meaning of 18 U.S.C. § 924(c). We disagree.

Section 924, Title 18, is part of the Gun Control Act of 1968, enacted in the wake of the political assassinations of that decade. The purpose of that legislation was

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[2] Title 18 U.S.C. § 111 provides for a sentence of up to three years for simple assault; up to ten years where an assault is committed with a "deadly or dangerous weapon":

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the states effectively to regulate firearms traffic within their borders." H. Rep. No. 1577, 90th Cong. 2d Sess., *reprinted in* (1968) U.S. Code Cong. and Ad. News 4410, 4411. Toward that end, Congress enacted 18 U.S.C. § 924(c)(2) which makes it a federal crime to possess an unregistered firearm, federal jurisdiction being predicated upon commission of a federal felony while in possession of such a weapon. The statutory scheme shows that Congress was concerned not only about persons who possess unregistered firearms, but also about persons who, although in lawful possession of a firearm, use it to commit a federal felony. *See* 114 Cong. Rec. 22235-7 (1968). Thus, in subsection (1) of the statute, Congress created a crime separate from that created in subsection (2), making it a federal crime to use a firearm—whether registered or unregistered—to commit a federal felony.

In view of the broad objectives of the legislation, we cannot agree with defendants that the term "felony" in § 924(c)(1) should be narrowly construed so as to exclude narcotics conspiracies and assaults on federal officers.[3] The construction urged by defendants would limit

[3] That Congress intended the term "felony" to be broadly construed finds support in the legislative history of § 924. During the House debates on the bill, Representative Casey proposed a version that would have limited the operation of the statute to certain enumerated violent crimes. *See* 114 Cong. Rec. 21061-3; 21765-5. The rejection of this version suggests that Congress did not wish to thus limit the statute. Indeed, in keeping with the ambitious purposes of the statute, § 924 has been applied to a broad range of felonies. *See, e.g., United States* v. *Howard*, 504 F.2d 1281 (8th Cir. 1974) (counterfeiting); *United States* v. *Ramirez*, 482 F.2d 807 (2nd Cir.), *cert. denied*, 414 U.S. 1070 (1973) (narcotics offenses conspiracy); *United States* v. *Sudduth*, 457 F.2d 1198 (10th Cir. 1972) (sale of heroin).

The only suggestion to the contrary is the remarks of Representative Poff, the bill's sponsor, that:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officers, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other felonies.

114 Cong. Rec. 23904-5 (1968). Although a strong statement by the sponsor of a bill made expressly for the sake of legislative history carries great weight, it is not necessarily dispositive and we need not narrowly construe this statute—which by its language and legislative history was obviously intended to be broad in its reach—on the basis of this statement.

the ambit of subsection (2) whose purpose was to reach the unlawful possession of all firearms, with commission of a federal felony being merely a jurisdictional linchpin. Accordingly, we hold that § 924 encompasses the federal felonies with which defendants were charged.

B.

A different question is posed, however, as to whether the double jeopardy clause protects a defendant from being convicted both of the crime of use of a dangerous weapon to assault a federal officer (18 U.S.C. § 111) and use of a firearm to commit that felony [18 U.S.C. § 924(c)(1)]. On this, there appears to be some disagreement among the circuits.

In *United States* v. *Eagle*, 539 F.2d 1166 (8th Cir. 1976), *cert. denied*, 97 S.Ct. 1146 (1977), defendant, an Indian was convicted of assault with a dangerous weapon upon the person of another Indian on a reservation, in violation of 18 U.S.C. § 1153. The defendant was also convicted for use of a firearm to commit the offense, as proscribed by 18 U.S.C. § 924(c)(1). The eighth Circuit avoided the double jeopardy issue, holding as a matter of statutory construction that Congress did not intend Section 924 to encompass statutes that already provide for added penalties where weapons are used. In so holding, it relied on the remarks of Representative Poff, the bill's sponsor, that § 924 should not be construed to encompass felonies for which there is already an added penalty for the use of a weapon. *See*, 114 Cong. Rec. 23904-5 (1968).

In *United States* v. *Crew*, 538 F.2d 575 (4th Cir. 1976), *cert. denied*, 97 S.Ct. 144 (1977), defendant was convicted under 18 U.S.C. § 2113, the federal bank robbery statute which, like 18 U.S.C. § 111, provides for an

enhanced penalty where a "dangerous weapon" is used. He was also convicted under § 924(c)(1) for using a firearm to commit that felony, and under § 924(c)(2) for carrying a firearm unlawfully during the commission of that felony. He received consecutive sentences under each of these three counts. The Fourth Circuit held that conviction and consecutive sentences under both § 2113 and § 924(c)(1) did not violate the double jeopardy clause because each statute requires proof of different elements:

> In order to sustain a conviction under Section 2113(d) the government must establish that the perpetrator assaulted a person, or jeopardized the life of a person, by using a dangerous weapon or device during the commission of the robbery. In comparison, in order to sustain a conviction under Section 924(c) the government must establish that the perpetrator used or carried a firearm during the commission of a felony. The appellants would have us equate "using a dangerous weapon or device" with "used or carried a firearm" and find that the prohibition against double jeopardy has been violated. However, it is clear that Congress never intended to equate these terms.
>
> The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of any weapon or device during the course of a bank robbery which jeopardized the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are affirmed.

Id., at 477-478.

A somewhat different approach was taken by a district court in *United States* v. *Hearst*, 412 F.Supp. 877 (N.D. Cal. 1976) in ruling on a motion to dismiss an indictment charging both armed bank robbery and use of a firearm

to commit that felony. Although it denied the motion, the court indicated that consecutive sentences under both counts might contravene the constitutional guarantee against double jeopardy:

> . . . [I]t is a settled principle of law that two separate offenses arising out of the same act or transaction may be charged where "each [statutory] provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299 304 . . . (1932). This standard is satisfied by the two offenses charged here, for the reason that the first requires the use of *any* dangerous weapon in the robbery of a *bank*, whereas the second specifically requires the use of a *firearm* in the commission of *any* felony.
>
> It is, of course, an altogether different question whether the defendant may or should be *punished* twice through consecutive sentences for the conviction of two offenses arising out of a single act. In denying the motion to dismiss either indictment for violation of the double jeopardy clause the Court does not intend to foreclose the defendant from raising the question of double punishment should she be convicted under both counts of the indictment and the Court be required to pass sentence. In that eventuality the Court will be open to any arguments the defendant may have against compounding sentences for these alleged offenses.

Id., at 878-879. (Emphasis in original).

We agree that an indictment charging violation of both sections 111 and 924(c)(1) does not on its face implicate the double jeopardy clause: § 111 punishes *assault* with a *deadly or dangerous weapon*—which could be a knife or an explosive as well as a firearm; § 924(c)(1) punishes the use of a *firearm* to commit a *felony*—which could be any felony. However, where the deadly weapon used in a § 111 charge *is* a firearm and the felony charged in a § 924(c)(1) count *is* an assault and the government does not prove additional elements for either offense, it is clear that a defendant will be twice punished

for the identical offense if he is sentenced under both counts.

Multiple punishment for the same offense at a single trial is forbidden by the double jeopardy clause. *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873). *See generally*, Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965). In a line of cases, the Supreme Court has continued to assume the validity of this principle, but has generally found the misconduct at issue to constitute distinct offenses. *See, e.g., Gore* v. *United States*, 357 U.S. 386 (1958), *reh. denied*, 358 U.S. 858 (1958); *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Morgan* v. *Devine*, 237 U.S. 632 (1915); *Gavieres* v. *United States*, 220 U.S. 238 (1911); *Burton* v. *United States*, 202 U.S. 344 (1906). The test enunciated by the Court is whether "each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, *supra*, at 304. See also, *United States* v. *Kenny*, 462 F.2d 1205 (3rd Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Johnson*, 462 F.2d 423 (3rd Cir. 1972), *cert. denied*, 410 U.S. 932 (1973).[4]

On the facts of this case, it is clear that the elements proven under the § 111 counts (Counts 6 and 7) and the § 924(c)(1) count (Count 19) were identical: under Counts 6 and 7 the government proved assault on federal officers with a dangerous weapon which was a firearm. Under Count 19, the government proved use of the identical firearm to commit a felony which was the assault on the identical federal officers. Accordingly, we hold that when La Rocca was sentenced under Count 19 consecutively to Counts 6 and 7, he was twice punished for the same conduct. We remand this case to the district court at which point the government must move for resentencing under either Count 19 or Counts 6 and 7.[5] The trial court may not impose a more severe sentence under either count. To do so would ignore the clear intent of this opinion and punish the defendant twice for the same offense. In future cases, where conviction is obtained under both § 111 and § 924(c)(1), and it is determined that the "deadly weapon" charged in the § 111 count is the firearm charged in the § 924(c)(1) count, and that the "felony" charged in the § 924(c)(1) count is the assault charged in the § 111 count, the court may sentence the defendant under one of the sections or the other, but may not sentence under both sections.

[4] For the sake of clarity, we would note that the principles of double jeopardy relied on herein are distinguishable from the principles relied on by the Supreme Court in ruling on the propriety of consecutive sentencing under the subsections of the bank robbery statute, 18 U.S.C. § 2113. In *Prince* v. *United States*, 352 U.S. 322 (1957), the Court held as a matter of *statutory construction* that consecutive sentences could not be imposed under the subsections of that statute. Following *Prince*, we held in *United States* v. *Corson*, 449 F.2d 544 (3rd Cir. 1971) (en banc), that where a defendant is convicted under more than one subsection of § 2113 the sentencing judge should impose a general sentence on all counts not to exceed the maximum permissible sentence which carries the greatest maximum sentence. *See generally*, Note, *The Federal Bank Robbery Act —The Problem of Separately Punishable Offenses*, 18 Wm & Mary L. Rev. 101 (1976). Also distinguishable is the "merger" theory wherein a lesser included misdemeanor is said to merge into a felon thus permitting a sentence on only the latter. *See generally*, 22 C.J.S. Criminal Law § 10, at 42-6.

C.

While prosecution under the *use* provision of § 924(c)(1) may, as in this case, create double jeopardy problems when coupled with a § 111 count, prosecution under the *carrying* provision of § 924(c)(1) will not. The latter subsection contains an element not required to be proved under § 111: the government must prove that the firearm was carried "unlawfully." As we read it, the

[5] While we recognize that La Rocca was charged in the § 924 count with using a firearm to commit both assault and conspiracy, we cannot sustain his § 924 sentence based on commission of conspiracy. It is a fair inference from the record that the conspiracy to distribute drugs terminated as of the time that defendants decided to rob Harvey. Nor are the convictions on the conspiracy counts conclusive, for the jury was entitled to convict defendants on these counts even if it found that the conspiracy was shorter in duration than was charged in the indictment. *See, e.g., United States* v. *Somers*, 496 F.2d 723 (3rd Cir.), *cert. denied*, 419 U.S. 832 (1974). In any event, since both conspiracy and assault were charged as the underlying felonies in Counts 6 and 7, we cannot tell on which the jury relied.

term "unlawfully" requires the government to prove that the defendant's possession of the firearm violated federal, state or local registration laws. *See, United States* v. *Rivero*, 532 F.2d 450 (5th Cir. 1976); *United States* v. *Howard*, 504 F.2d 1281 (8th Cir. 1974); *United States* v. *Ramirez*, 482 F.2d 807 (2nd Cir.), *cert. denied*, 414 U.S. 1070 (1973). Therefore, as to Busic, consecutive sentences under § 111 and § 924(c)(2) were permissible.[6]

III

Defendants also cite as error the refusal of the district court to sever those counts of the indictment which charge them with receiving firearms while being convicted felons in violation of 18 U.S.C. § 922(h).[7] The indictment actually set forth in these counts that both defendants had been convicted in 1973 for assaulting two federal officers, theft of government property, and use of a firearm to commit these felonies and, in addition, that La Rocca had also been convicted in 1970 of trafficking in machine guns, assault and battery, pointing a deadly weapon and possession of narcotics. On oral argument in this Court, however, it was agreed that the indictment was never shown to the jury.

Defendants argue that the district court's refusal to sever the § 922 counts resulted in admission into evidence of their prior convictions in the government's case-in-chief which prejudiced them in the trial of the other offenses charged.

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[6] We are mindful of the potential injustice caused by our decision today: La Rocca, who actually shot at the federal agents, may receive a lesser sentence than Busic, who was only vicariously liable for these assaults. However, the district court has authority to cure this disparity on a motion under Fed.R.Crim.P. 35.

[7] 18 U.S.C. § 922(h) provides in pertinent part:

> (h) It shall be unlawful for any person—
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The question of severing for trial counts requiring proof of prior convictions from other counts which do not permit such proofts has received little attention in the circuits.[8] In *United States* v. *Park*, 531 F.2d 754 (5th Cir. 1976), the defendant had been charged in a two-count indictment with a substantive narcotics offense and with receiving firearms while being a convicted felon. On appeal, he contended that he had been prejudiced at trial by joinder of these counts because it enabled the government to bring to the jury's attention the fact that he was a convicted felon. The Fifth Circuit held that the trial court's refusal to sever was not error because defendant's prior conviction for having knowingly manufactured drugs would, in any event, have been admissible on the other count. *See also, United States* v. *Abshire*, 471 F.2d 116 (5th Cir. 1972). A novel approach to this problem was adopted by the district court in *United States* v. *Franke*, 331 F.Supp. 136 (D.Minn. 1971). There, on a motion for severance, the district court granted defendant a two-stage trial, whereby the jury, having reached a verdict on the other counts, would then proceed to consider the counts requiring proof of prior convictions.

The defendants urge that the district court erred in refusing to sever the counts alleging violation of 18 U.S.C. § 922(h), inasmuch as at the outset of the trial the district court had no way of knowing that the prior convictions alleged in the § 922(h) counts might otherwise have been admissible on the other counts. On the facts of this case we find that the district court did not commit reversible error since the defendants raised the defense of entrapment at trial and the evidence of their prior convictions was admissible under Rule 404(b), Federal Rules of Evidence, to rebut this defense by proving predisposition. In addition, prejudice was minimized in this case: the jury was never shown the indictment,

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[8] Although little appellate attention has been directed to this issue, it appears that it has been the practice of some district courts to sever such counts. *See e.g., United States* v. *Napier*, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975); *United States* v. *Roberts*, 503 F.2d 453 (8th Cir. 1974).

and the government was not permitted to elicit the factual basis of these convictions. For these reasons, we hold that the refusal to sever was harmless error.

Nevertheless, we think that in ruling on a pre-trial motion to sever the district court should determine whether evidence of the prior convictions would be independently admissible on the other counts. If it is determined that the convictions would not be admissible on the other counts—that were these counts to be tried alone the jury would not hear this evidence—then severance should be granted.[9] In addition, we think that, in framing an indictment, the better practice dictates that the government should not set forth the details of defendants' actual convictions, but merely allege that the defendant is a convicted felon. If Defendant desires the particulars, he may, of course, so move for them. See Fed.R.Crim.P. 7.

IV

Defendants further contend that the trial court committed reversible error in refusing to instruct the jury that it might draw an adverse inference from the government's failure to call its informer, Richard Hervaux. Despite the fact that the government actually offered to serve Hervaux, defendants contend that the burden of calling him rested on the government, and that the government's failure to do so entitled defendants to a "missing witness" instruction. We agree with the district court that defendants were not entitled to the requested charge.

The basis of the "missing witness" inference is that, where a party fails to call an available witness whose testimony could be expected to favor him, a natural inference arises that that witness would have exposed facts *unfavorable* to that party. *See, Graves* v. *United States,*

[9] Of course, we do recognize the difficulties inherent in such pretrial determinations. Nevertheless, if the government chooses to join such counts, it must be prepared to justify the joinder to the trial judge by some showing that the prior convictions would be admissible even absent joinder. By the same token, in moving for severance of these counts, a defendant may be required to reveal some of his trial strategy, as to an entrapment defense or the like, in the resolution of his motion for severance.

150 U.S. 118, 121 (1893); *Burgess* v. *United States,* 440 F.2d 226 (D.C.Cir. 1970); 2 Wigmore, Evidence, 162, § 289 (3d Ed. 1940). This Court has on several occasions addressed the applicability of this inference. Thus, in *United States* v. *Jackson,* 257 F.2d 41 (3rd Cir. 1958), we reverse a conviction based on the trial court's refusal to permit defense counsel to comment on the government's failure to produce its key informant, a man known only as "Sarge". In *United States* v. *Restaino,* 369 F.2d 544 (3rd Cir. 1966), however, we held that the government's failure to produce defendant's co-defendants who had pleaded guilty, and were known to and available to both sides, did not give rise to any inference as to whom their testimony could be expected to favor. More recently, in *United States* v. *Hines,* 470 F.2d 225 (3rd Cir. 1972), *cert. denied,* 410 U.S. 968 (1973), we held that the government's failure to call an identification witness would also not give rise to any inference. There, after stating that its application requires the witness to have special, non-cumulative information relevant to the case, we went on to note the weakness of the missing witness inference:

> Clearly, every absent but producible witness possessing some knowledge of the facts need not be made the subject of the inference. Often all that can be inferred is that the witness' testimony would not have been *helpful* to a party, not that the testimony would have been *adverse.*

470 F.2d at 230. (Emphasis in original).

As we noted in *Hines,* a party's failure to call a witness does not necessarily imply that the witness's testimony would have been unfavorable to that party. Although Hervaux may have had special knowledge relevant to this case, we think other considerations outweigh this reason for giving the missing witness instruction. Every experienced trial lawyer knows that the decision to call a witness often turns on factors which have little to do with the actual content of this testimony. Considerations of cumulation and jury fatigue may preclude calling a witness who is entirely helpful; calcula-

tions that a witness may help a lot but hurt a little may compel restraining when counsel believes that his burden is already met. Then, too, questions of demeanor and credibility, hostility, and the like may influence the government not to produce a witness whose testimony might be entirely harmful to the defendant.[10] And, of course, as we noted in *Hines*, in many instances, a witness's testimony might have been neither *helpful* nor *adverse* to the party who failed to call him. Indeed, cases such as this one—where both parties fail to call an available witness—shatter the myth that an absent witness's testimony might be expected to be particularly favorable to either side.

Accordingly, we hold that where neither the government nor the defendant call a witness who is available to both, the "missing witness" instruction does not properly lie. *See, United States* v. *Kenney*, 500 F.2d 39 (4th Cir. 1974); *United States* v. *Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *United States* v. *Higginbotham*, 451 F.2d 1283 (8th Cir. 1971).[11] Under these circumstances, no inference as to the content of the missing testimony is possible since both sides may be presumed to wish to call a favorable witness, while both would not wish to call one who was adverse. This is not to say that the defendant does not have the absolute right to stand mute or to rest on the government's failure to produce affirmative *evidence* to substantiate any necessary elements of the offense charged. But it is one thing to rely on the government's failure of proof, and quite another to argue the existence of affirmative evidence, which the jury did not hear, inferred from the mouth

[10] We cannot help but note that the defendant who in summartion asks the question, "Why didn't the government call 'X'?" relies on the inability of the government to respond by advising the jury of any of these considerations, all of which are outside the record and some of which stem from the subjective judgment of the prosecutor.

[11] The basis for denying an instruction under these circumstances was perhaps best stated by Judge Robb in his concurring opinion in *Burgess* v. *United States, supra*, at 239: "Having deliberately rejected an opportunity to produce a witness a defendant should not be permitted to complain that the witness is missing."

of a witness who was not called. Thus, we agree with the district court that, under the circumstances of this case, defendants were not entitled to the missing witness instruction.

V

Defendants also challenge the trial court's refusal to sever their cases for trial, the admission into evidence of the rebuttal testimony of Special Agent Masters, and the sufficiency of the evidence to sustain Busic's conviction for assault.[12] We find these challenges to be without merit.[13] Thus, we affirm Busic's conviction in all

[12] Defendant Busic concedes that he aided and abetted the assault on Harvey, who was not a federal officer. However, he challenges the sufficiency of the evidence to sustain his conviction for assaulting federal officers Alfree, Petraitis and John Macready. We find this contention to be without merit since the evidence overwhelmingly supports his conviction under both a conspiracy and an aiding and abetting theory. *See Nye & Nis* v. *United States*, 336 U.S. 613 (1949); *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

[13] We have also considered and rejected the following challenges raised by defendants in their *pro se* briefs:

"1. Whether the remarks actions and conduct of the trial prosecutor was so flagrant and inflammatory, or so prejudicial and violative of due process to justify a new trial.

2. Whether or not appellants were deprived of a fair trial when the trial court denied them a severance; in light of the extreme prejudice to one defendant or the other inevitable.

3. Whether the trial judge was prejudicial to the extent of depriving appellants of a fair and impartial trial.

4. Whether appellants were deprived of due process when they were deprived of a prompt post-arrest arraignment.

5. Whether the defendants were deprived of due process when the government failed to produce the key government alleged informant in the case—Richard Jervaux.

6. Whether the appellants were deprived of due process when they were denied Jenks Act discoverable materials.

7. Whether or not appellants were deprived of effective assistance of counsel, and counsel who suppressed evidence favorable to his clients.

8. Whether or not the government met its burden to sustain the convictions that appellants conspired to obtain, dis-

respects. La Rocca's case is remanded to the district court for resentencing on either the counts alleging violation of 18 U.S.C. § 111 or the count alleging violation of 18 U.S.C. § 924(c)(1).

To the Clerk:

Please file the foregoing opinion.

/s/ Herbert J. Stern
HERBERT J. STERN
U.S.D.J.

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tribute and sell controlled substances; or that any conspiracy existed at all."

(Appellants' *Pro Se* Brief, at 7).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL
Michael M. Busic, Appellant in No. 77-1375

UNITED STATES OF AMERICA

vs.

LA ROCCA, ANTHONY
Anthony La Rocca, Jr., Appellant in No. 77-1376

(D.C. Criminal Nos. 76-137-1 and 76-137-2)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN and ROSENN, *Circuit Judges*
and STERN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 21, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

District Court, entered March 15, 1977, be, and the same is hereby affirmed as to appeal No. 77-1375. The appeal at No. 77-1376 is remanded for proceedings in accordance with the opinion of this Court.

ATTEST:

/s/ [Illegible]
Clerk

January 5, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375
77-1376

UNITED STATES OF AMERICA, APPELLEE

v.

MICHAEL BUSIC, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY LA ROCCA, JR., APPELLANT

Appeal from the Judgment and Conviction of the
United States District Court for the
Western District of Pennsylvania

SUPPLEMENTAL OPINION SUR REHEARING—

Filed Dec. 12, 1978

(Reargued June 7, 1978)

Before Van Dusen and Rosenn, *Circuit Judges*,
and Stern,* *District Judge*

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STERN,* *District Judge*

On the government's petition for rehearing, we reconsider our opinion in *United States* v. *Busic*, Nos. 77-1375 and 77-1376 (3rd Cir., January 5, 1978) in light of the Supreme Court's subsequent decision in *Simpson* v. *United States*, —— U.S. ——, 46 U.S.L.W. 4159 (February 28, 1978). Although we reach the same conclusion, we do so on somewhat different grounds.

In *Simpson* v. *United States*, the Court held that a defendant may not receive consecutive sentences under section 924(c) and under the subsection of the Bank Robbery Statute, 18 U.S.C. § 2113(d), which provides for an enhanced penalty where a "dangerous weapon or device" is used.[1] The Court noted that "[c]ases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing . . . raise the prospect of double jeopardy," but declined to reach the constitutional question. Instead, it based its decision on the legislative history of section 924(c), on the "policy of lenity" which in close cases counsels against the imposition of additional penalties, and on the principal of statutory construction which gives "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . ." —— U.S. at ——.

In light of *Simpson*, we conclude that we need not have reached the constitutional question in *Busic*, and accordingly we vacate Part II-B of our opinion. We next address two additional questions raised by *Simpson*: first, whether as to La Rocca, the government on resentencing is permitted to *elect* to proceed under either section 924(c)(1) or section 111; second, whether as to Busic, the *Simpson* decision prohibits the consecutive sentences under section 111 and section 924(c)(2).

We believe that the *Simpson* decision did not adopt the approach of the Eighth Circuit in *United States* v. *Eagle*, 539 F.2d 1166 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977), which held that a crime for which the penalty is enhanced by use of a dangerous weapon cannot form the basis of a prosecution under section 924(c)(1). Rather, we believe that under *Simpson*, the government is free to prosecute under either section, *provided* that the defendant is not sentenced under both.[2] We are supported in this view by Justice Brennan's closing words in *Simpson*: "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be *sentenced* under both § 2113(d) and § 924(c)." —— U.S. —— (emphasis supplied). Moreover, we believe that this conclusion is consistent with the Congressional purpose of section 924(c) which, as we noted in

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

[1] 18 U.S.C. § 2113(d) provides that:

> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

[2] Thus, since La Rocca's section 111 sentence was to run concurrently with his sentences on the other counts, should the government elect to proceed under section 924 rather than under section 111, he may receive the identical sentence which he earlier received. This would be entirely consistent with our reading of the *Simpson* opinion.

our first opinion, was to control and severely penalize the use of firearms.[3]

We also believe that the *Simpson* opinion does not proscribe the imposition of consecutive sentences under section 111 and section 924(c)(2). We adhere to the view which we expressed in our earlier opinion, that subsection (2) of section 924 creates an entirely separate offense from that punishable under section 111, since it requires that the government prove the weapon was carried "unlawfully".[4] The Court in *Simpson*, faced only with the imposition of consecutive sentences under the bank robbery statute and section 924(c)(1), had no occasion to differentiate between the two subsections of section 924(c). In view of our reading of the different Congressional purposes underlying the two subsections of section 924(c), we believe that *Simpson* applies only to subsection (1) of section 924(c).

Accordingly, as to Busic, we again affirm the imposition of consecutive sentences under section 924(c)(2) and section 111. La Rocca's case is remanded for resentencing, at which time the government may elect to proceed under either section 924(c)(1) or section 111, but not both.

TO THE CLERK:

Please file the foregoing supplemental opinion.

HERBERT J. STERN
District Judge

---

[3] On reargument, the government again asks that we sustain the section 924(c)(1) sentence using as a predicate La Rocca's conviction for narcotics conspiracy. Although we note that the jury was charged that it could convict La Rocca for having used a firearm during commission of either the assault or the narcotics conspiracy, we reiterate that it is impossible to ascertain on which of these felonies the jury relied. *See* Slip op., fn. 5.

[4] We are buttressed in this view by the fact that the weapon which Busic was convicted for having "carried unlawfully", was a different weapon from that used by La Rocca in committing the underlying assault, charged to Busic pursuant to 18 U.S.C. § 2. Thus, on the facts of this case, it is clear that Busic's conviction under section 929(c)(2) was for a crime completely separate from his conviction for assault with a dangerous weapon.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL

Michael M. Busic, Appellant in No. 77-1375
LA ROCCA, ANTHONY
Anthony La Rocca, Jr., Appellant in No. 77-1376

(D.C. Criminal No. 76-137-1 and 2)

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN and VAN DUSEN, *Circuit Judges* and STERN, *District Judge**

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was reargued by counsel on June 7, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 15, 1977, be, and the same are hereby affirmed with respect to appellant Busic and remanded for the resentencing of appellant La Rocca, at which time the government may elect to proceed under section 924 (c)(1) or section 111, but not both, all in accordance with the opinion of this Court.

ATTEST:

M. Elizabeth Ferguson
Chief Deputy Clerk

December 12, 1978

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 78-6020

MICHAEL M. BUSIC, PETITIONER,

v.

UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 78-6029 and a total of one and one half hours are allotted for oral argument.

June 4, 1979

SUPREME COURT OF THE UNITED STATES

No. 78-6029

ANTHONY LAROCCA ,PETITIONER

v.

UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 78-6020 and a total of one and one half hours are allotted for oral argument.

June 4, 1979

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Nos. 78-6020 and 78-6029

Supreme Court, U. S.
FILED
MAY 11 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

MICHAEL M. BUSIC, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LaROCCA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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Assistant to the Solicitor General

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1B-18B, 1C-4C) are reported at 587 F.2d 577. The opinion of the district court (Pet. App. 1A-15A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1978; thereafter, the government's petition for rehearing was granted, and the judgment on rehearing was entered on December 12, 1978. The petition for a writ of certiorari in

No. 78-6020 was filed on January 10, 1979, and the petition for a writ of certiorari in No. 78-6029 was filed on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge under 18 U.S.C. 924(c) may be sustained if the statute creating the predicate felony permits an enhanced sentence when a dangerous weapon is used, but the enhancement provision is not invoked and thus the defendant's sentence is not doubly enhanced because of his use of a firearm (Pet. No. 78-6029).

2. Whether consecutive sentences may be imposed for assaulting a federal officer with a dangerous weapon, in violation of 18 U.S.C. 111, and for carrying a firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2) (Pet. No. 78-6020).

STATUTES INVOLVED

18 U.S.C. 924(c) states:

> (c) Whoever--
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

18 U.S.C. 111 states:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on five counts of narcotics offenses, in violation of 21 U.S.C. 841(a)(1), 843(b), and 846 (Counts 1-5), and on six counts of unlawful possession of firearms, in violation of 26 U.S.C. 5861(c) and (d), 5871, 18 U.S.C. 922(h), and 924(a) (Counts 8-13).[1/] Petitioners were also convicted of two counts of armed assault on federal officers, in violation of 18 U.S.C. 2 and 111 (Counts 6 and 7). Petitioner Busic was convicted of unlawfully carrying a firearm in the commission of federal felonies, in violation of 18 U.S.C. 924(c)(2) (Count 18). Petitioner LaRocca was convicted of using a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(1) (Count 19).

Petitioners were each sentenced to a total of 30 years' imprisonment, apportioned as follows: concurrent terms of five years' imprisonment on Counts 1 through 4, with special parole terms on each count ranging from two to three years, and four years' imprisonment on Count 5; five years' imprisonment on Counts 6 through 13 to be served concurrently with

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1/ Petitioner Busic was not convicted on Count 12. Busic was convicted on three additional counts of unlawful possession of firearms, in violation of 18 U.S.C. 1202(a)(1) (Counts 14-16).

each other, but consecutively to the sentences on Counts 1 through 5; petitioner Busic was also sentenced to terms of two years' imprisonment on Counts 14 through 16, to be served concurrently with each other and with the sentences imposed on Counts 6 through 13, and to 20 years' imprisonment on Count 18 to be served consecutively to all other terms; petitioner LaRocca was sentenced to 20 years' imprisonment on Count 19 to be served consecutively to all other terms.

1. The evidence at trial showed that Charles D. Harvey, an agent of the Drug Enforcement Administration, first met petitioners on May 7, 1976, at the home of Richard Hervaux, a government informant. At that time petitioners agreed that Harvey would go with them to Florida to purchase drugs from one of the petitioners' suppliers for re-distribution in the Pittsburgh area (Tr. 21-22). Several days later, Harvey again met with petitioners and received samples of the marijuana and cocaine that he was to purchase from their Florida source (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, LaRocca called him and insisted on seeing some "front money." A meeting was arranged for the following day in the parking lot of a shopping center in Monroeville, Pennsylvania (Tr. 32-33).

After he arranged for surveillance, Harvey went to the shopping center with $30,000 in cash, as agreed (Tr. 34-35). Petitioners were already there in LaRocca's car (Tr. 36). LaRocca entered Harvey's car, and the two drove to the other side of the parking lot (Tr. 39). As Harvey withdrew the money from the trunk, LaRocca reached for his gun. Harvey ran, but LaRocca caught him and pointed his gun at Harvey's chest. Harvey gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, LaRocca fired at Harvey and missed. LaRocca then fired two shots at

the vehicle containing agents Alfree and Petraitis and two shots at the vehicle containing agent Macready (Tr. 40). He was then arrested and disarmed.

The officers also arrested Busic, who had been leaning on a nearby car during the shootout, and who exclaimed, "remember that I didn't shoot at anybody and I didn't draw my gun" (Tr. 40-41). Busic was searched, and a pistol was found in his belt. A search of LaRocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment (Tr. 44).

2. a. In a decision announced prior to the decision of this Court in Simpson v. United States, 435 U.S. 6 (1978), the court of appeals held that 18 U.S.C. 924(c) is applicable to a defendant who is also charged with aggravated assault of a federal officer under 18 U.S.C. 111 (Pet. App. 6B).[2/] It also held that when the deadly weapon used in the Section 111 assault is a firearm, and the felony charged under Section 924(c)(1) is the assault that forms the basis of the charge under Section 111, sentencing the defendant on both counts would violate the Double Jeopardy Clause (Pet. App. 9B). Accordingly, the court of appeals held that LaRocca's case must be remanded to the district court for resentencing under either Section 111 or Section 924(c)(1), but not both (Pet. App. 10B). In contrast, the court affirmed petitioner Busic's conviction on both counts, because it concluded that a prosecution for carrying a weapon during the commission of a felony under 18 U.S.C. 924(c)(2) requires proof of an element--the unlawful

2/ "Pet. App." refers to the appendix filed in No. 78-6020.

possession of a firearm--that is not an element of the offense under Section 111 (Pet. App. 10B-11B).

b. Following this Court's decision in Simpson, the court of appeals granted rehearing, vacated the portion of its first opinion dealing with the Double Jeopardy Clause, and reached the same disposition of the case by applying the rationale of this Court's opinion in Simpson (Pet. App. C1-C3). The court of appeals concluded (Pet. App. C2) that Simpson prohibits sentencing a defendant both under the enhancement provision of Section 111 and under Section 924(c)(1), but that the government has the option of proceeding under either section; accordingly, it was proper to remand LaRocca's case for resentencing under either Section 111 or Section 924(c)(1) at the government's option.[3/] The court found the rationale of Simpson inapplicable to Busic's conviction under Section 924(c)(2) for "unlawfully" carrying a weapon during the commission of a felony, and it affirmed that conviction (Pet. App. C3).

DISCUSSION

1. Petitioner LaRocca received a five-year sentence under the enhancement portion of 18 U.S.C. 111[4/] and a consecutive sentence of 20 years' imprisonment for using a firearm during the commission of the Section 111 felony. He argues that Simpson holds that Section 924(c) is wholly inapplicable in any case where Congress has expressly provided for an enhanced sentence if a firearm is used in the commission of a given

3/ The court rejected (Pet. App. 10B) the government's alternative argument that LaRocca's Section 924(c) conviction could be upheld on the ground that the petitioners' firearms were carried and used not only in the commission of the assault offense, but also in the commission of acts forming part of the narcotics conspiracy of which the jury convicted them.

4/ Under Section 111, unarmed assaults are punishable by up to three years' imprisonment; assaults accomplished with a dangerous weapon are punishable by up to 10 years. Accordingly, two years of LaRocca's five-year sentence constitute an enhancement penalty under Section 111.

offense. Therefore, he contends, the court of appeals erred in interpreting Simpson to permit a defendant who used a firearm in the commission of a Section 111 felony to be sentenced under Section 924(c) in lieu of sentencing under the more lenient enhancement provision of Section 111.

We acknowledge that there is language in the Court's opinion in Simpson that lends considerable credence to petitioners' contention that Section 111 violations can never supply the predicate for a conviction under Section 924(c)(1), especially the Court's reliance upon the statement of Congressman Poff (see 435 U.S. at 13; but see p. 10 n.8, infra). But the holding of Simpson was a narrow one that refused "to allow the additional sentence authorized by §924(c) to be pyramided upon a sentence already enhanced under §2113(d) * * *" (435 U.S. at 14). Thus, while the holding of Simpson unquestionably would bar the enhancement of the sentence imposed under Section 111 for use of a dangerous weapon and the imposition of an additional, consecutive sentence under Section 924(c)(1) for the same firearm use, it does not dispose of the question --which we submit is materially different--of the propriety of imposing a sentence under Section 924(c)(1) in lieu of using the enhanced penalty provision of the underlying felony statute.

Since the Court in Simpson had before it only a case where the defendant's sentence was doubly enhanced because of the use of a firearm in the commission of a bank robbery, it had no occasion to pass upon the question whether Congress--even though it did not intend to permit the double enhancement of sentences that occurred in Simpson--may nevertheless have intended to allow the prosecutor the discretion to charge and the court to sentence under either the enhancement provisions included in Sections 2113 and 111, or the enhancement provision in Section 924(c). Because Section 924(c) creates

penalties that are both qualitatively and quantitatively different from the penalties incorporated in the aggravated assault statute and other similar laws dealing with "dangerous weapons," we believe the question whether Section 924(c) may be invoked as an alternative to the enhancement provisions in such statutes is an important one that merits independent consideration. Moreover, we note that the only two courts of appeals to pass on this question since Simpson, the Third Circuit in the instant case and the Fifth Circuit in United States v. Shillingford, 586 F.2d 372, 376 & n.7 (1978), have concluded, as we urge here, that the penalty provisions of Section 924(c) may be invoked in lieu of specific enhancement provisions in Sections 111 and 2113(d).

Instead of merely providing for longer terms of incarceration, Section 924(c) establishes mandatory minimum sentences, imposes increasingly severe sentences on recidivists (without possibility of suspension or probation), and prohibits its concurrent sentencing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence, while a second-time offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a consecutive 25-year sentence. These comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use of a firearm in the commission of a felony[5/]--risks that Congress could legitimately have concluded are more serious than the risks attending the use of any other dangerous weapon, which are sufficient to trigger

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5/ The Gun Control Act of 1968 (Pub. L. No. 90-618, 82 Stat. 1213), of which Section 924(c) became a part, was enacted largely in response to a single concern: the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968).

the enhancement provision of Section 111.[6/]

By contrast, neither Sections 111 nor 2113(d) prescribes mandatory minimum sentences, nor do they prohibit concurrent sentences or probation. Moreover, the maximum sentence of 10 years' imprisonment under the enhancement provision of Section 111 is only seven years greater than the maximum sentence under Section 111 for simple assault. If petitioners are correct, a person who, armed with a gun, assaults a federal officer would be subject to no more than an additional seven years' imprisonment for his first offense (with no mandatory minimum sentence), whereas persons committing any other federal felony while so armed would be exposed to an additional sentence of at least one, and possibly 10 years. If the person committing an assault armed with a gun were a recidivist, he would remain exposed to only seven additional years of imprisonment (with no mandatory minimum) under Section 111, with the possibility of probation or a concurrent sentence, whereas all other persons twice convicted of using a firearm to commit any other felony would face an additional consecutive sentence of at least two and possibly 25 years' imprisonment without suspension or probation under Section 924(c).[7/]

6/ Indeed, the principle of giving "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern"--on which the Court relied in Simpson, 435 U.S. at 15--arguably suggests that in a case where a firearm is employed in the commission of an assault in violation of Section 111 or a bank robbery, the more specific firearm enhancement provision in Section 924(c) should be given precedence over a more general dangerous weapon enhancement provision. Moreover, the firearm provision, enacted in 1968, long after the enhancement provisions of Section 111 or 2113, more fairly reflects the contemporary congressional view of the gravity of the use of firearms in the commission of federal felonies.

7/ Similarly, the maximum sentence for aggravated bank robbery under Section 2113(d) is only five years greater than the maximum for simple bank robbery, whether or not the robber is a recidivist. In contrast, under Section 924(c), the

[Continued]

In our view, it is most unlikely that Congress intended to subject persons who commit aggravated assaults on federal officers to lower penalties than other gun-wielding felons. The Court concluded in Simpson that in the absence of a clear statement of congressional intent, the rule of lenity counsels an interpretation of Section 924(c) that precludes the double enhancement of a defendant's sentence for the use of a firearm in the commission of a felony.[8/] But the principle of lenity does not lead to the result--which we believe Congress surely did not intend--that persons who commit aggravated assaults on federal officers should be subject to lesser penalties, and thus to a lesser deterrent, than all other gun-wielding felons. Petitioners' construction of Section 924(c) has the perverse consequence of rendering the stiff penalty provisions that Congress enacted to deter the increasing use of firearms inapplicable to the very class of offenses--including bank robbery and assault on a federal officer--where Congress had already found that enhanced penalties were needed to deter and punish those who used dangerous weapons.

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use of a gun in the commission of the robbery would subject the defendant to an additional sentence of up to 10 years for a first offense and up to 25 years for a second offense.

8/ Congressman Poff stated (114 Cong. Rec. 22231 (1968)) that Section 924(c) "is not intended to apply to title 18, sections 111, 112, or 113, which already define the penalties for the use of a firearm in assaulting officials, [or] with sections 2113 or 2114 concerning armed robberies of the mail or banks * * *." The Court concluded in Simpson (435 U.S. at 15) that the "sparse" legislative history of Section 924(c), especially the Poff statement, "points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of §2113(d)"--the aggravated bank robbery statute. We agree it likewise "points in the direction" of prohibiting the use of both Section 924(c) and the enhancement provision in Section 111. But we do not think Congressman Poff was speaking to the question, which was not raised in the debates, of whether Section 924(c) could be invoked in lieu of the dangerous weapons provisions in an appropriate case.

In our view, Section 924(c) should be interpreted as an alternative to the aggravated assault provision in Section 111 and the other similar laws dealing with the use of "dangerous weapons" in the commission of particular crimes. As we argued at length in our brief in Batchelder v. United States, No. 78-776 (argued April 18, 1979), in the case of such an overlap, where two statutes are applicable to the same criminal conduct, the prosecutor has the discretion to select the proper charge.[9/] We agree with petitioners that this question should be resolved by this Court in order to clarify the options available to prosecutors and sentencing courts in light of Simpson.[10/]

2. Petitioner Busic contends (Pet. 5-8) that the court of appeals erred in concluding that the decision in Simpson does not preclude the imposition of an additional penalty under Section 924(c)(2) for unlawfully carrying a weapon during the commission of an assault for which he has received an enhanced sentence under Section 111. If, as we contend, the prosecutor has discretion to charge under either the enhanced sentencing provisions of Section 111 or under Section 924(c), there is no need to consider in this case the question whether--as the court of appeals concluded--a defendant may also be sentenced

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9/ We are sending petitioners copies of our brief in Batchelder.

10/ We note that, had the district court understood the law to be as petitioners contend, it could have imposed sentences cumulating to the same length, without regard to Section 924, by making consecutive some of the sentences that were imposed concurrently. Indeed, it seems likely that the court would have done so, since the legal issue raised by petitioners is wholly unrelated to the severity of the offenses they committed. Accordingly, petitioners could receive a substantial and undeserved windfall if they prevail on their contentions. If the Court does grant review of the case and ultimately sustains petitioners' contention, we believe it would be appropriate to remand to the district court for complete resentencing on all counts (such resentencing not to exceed, of course, the total of 30 years' imprisonment originally imposed).

under both the enhanced sentencing provision of Section 111 and under Section 924(c)(2). Since Busic's five-year sentence under Section 111 was concurrent with the seven other five-year terms of imprisonment, only his sentence under Section 924(c)(2) will actually affect the term of his incarceration.

Moreover, whatever the merits of the court of appeals' conclusion that the Simpson rationale is inapplicable as a general matter to a charge under Section 924(c)(2), the Court need not reach that question in the instant case. There is ample reason to permit Busic's sentencing under both the enhancement provision and under Section 924(c)(2). Whereas this Court noted in Simpson that the government was relying on "the same proofs to support the convictions under both statutes" (435 U.S. at 12), Busic's conviction under Section 111--and its enhanced sentencing provision--was imposed because he aided and abetted LaRocca's armed assault on agent Harvey. Whereas the charge under Section 111 was aggravated assault because LaRocca was armed with a gun, Busic's sentence under Section 924(c)(2) was imposed because Busic himself was carrying a second gun. Busic violated Section 924(c)(2) because his possession of this second weapon was unlawful in view of his prior felony conviction. In this situation, the rationale of Simpson is, as the court of appeals correctly concluded, simply inapplicable.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1979

Supreme Court, U. S.
FILED
AUG 20 1979
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IN THE

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MICHAEL M. BUSIC,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR THE PETITIONER

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CITATIONS

CONSTITUTION

STATUTES

MISCELLANEOUS

IN THE

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OCTOBER TERM, 1978

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UNITED STATES OF AMERICA.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals and its Supplemental Opinion Sur Rehearing are reported at 587 F.2d 577 and may be found in the joint Appendix (A. 36, 57). The opinion of the Distict Court is unreported and may be found in the joint Appendix (A. 21).

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1978; thereafter, the Government's petition for rehearing was granted, and the judgment on rehearing was entered on December 12, 1978. The petitions for writ of certiorari and motion to proceed in forma pauperis were filed on February 2, 1979 and granted on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did Congress authorize prosecution under 18 U.S.C. 924(c) (use or carrying of a firearm during the commission of a federal felony) when an underlying violation with firearms of 18 U.S.C. §111 (assault on federal officers with firearms) was already subject to an enhanced penalty.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The United States Constitution, Fifth Amendment

> "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C. §924(c)

> "(c) Whoever
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. §111

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

STATEMENT OF THE CASE

For simplicity, petitioner incorporates the summary of evidence contained in the Opinion of the United States Court of Appeals for the Third Circuit (A. 36). Those portions of the Opinion discussing matters not material to the issues raised herein are omitted.

> "Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob 'front money' from an undercover agent. This attempted robbery culminated in a shootout with federal agents.
>
> * * *
>
> "Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some 'front money'. A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

> "As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immedately arrested and disarmed.
>
> "Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box contining ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment.
>
> * * *
>
> "The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being

convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having *used* (emphasis in the original) a firearm to commit the drug conspiracy and assaults on federal officers in violation of §924(c)(1); Busic for having *carried* (emphasis in the original) a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts—all to run consecutively to each other—for a total of 30 years for each defendant."

In its Supplemental Opinion Sur Rehearing (A. 57), the Third Circuit Court of Appeals rejected petitioner Busic's contention that as a matter of statuatory construction and in view of this Court's decision in the case of *Simpson* v. *United States*, 435 U.S. 6 (1978) 18 U.S.C. §924(c) does not apply in those cases where the penalty for an underlying felony (here 18 U.S.C. §111) was already enhanced for the use of a dangerous weapon. The lower court held in petitioner Busic's case, that *Simpson* does not proscribe the imposition of consecutive sentences under §§111 and 924(c)(2). In so holding, it made a technical distinction between the two subsections of §924. However, it also recognized that *Simpson* had no occasion to differentiate between the two subsections of §924(c). The judgment of sentence as to petitioner Busic was affirmed.

As to petitioner LaRocca, the lower court, on the basis of this Court's decision in *Simpson* remanded

for resentencing. On remand, the Government may elect to proceed under either §924(c)(1) or §111, but not both. In its original opinion, the Third Circuit Court of Appeals reached the same result in La-Rocca's case on the basis of Double Jeopardy.

ARGUMENT

Introduction

Petitioner Busic (hereinafter "Busic") contends that the Supplemental Opinion Sur Rehearing of the Third Circuit Court of Appeals misinterprets and misapplies this Court's decision and rationale in *Simpson* v. *United States,* 435 U.S. 6 (1978) (hereinafter "*Simpson*"). Both Busic and the Government urge this Court to clarify *Simpson.* Busic contends that the *Simpson* holding and rationale precludes not only the imposition of an additional consecutive sentence, but also the initial prosection under §924(c) when a defendant has committed an underlying federal felony which already permits the sentencing court to impose an enhanced penalty for the use of a firearm. In opposition, the Government urges this Court to expressly state that prosecutors have the discretion to charge, and the Courts have the power to sentence, under either the enhancement provisions of the underlying felony or the provisions of §924(c). (PET. U.S. 7).[1]

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[1] PET. U.S. refers to the Government's response to appellant's Petition for Writ of Certiorari. The document submitted by the Government is entitled Brief for the United States.

Preliminarily, reference is made to the difference in treatment accorded to Busic and petitioner LaRocca (hereinafter "LaRocca") in the Third Circuit. LaRocca's case is remanded for resentencing under either §§111 or 924(c). Busic's conviction and sentence is affirmed on the ground that his conviction was for §924(c)(2), the "carrying" subsection, as opposed to the "using" subsection of §924(c)(1), under which LaRocca was convicted and sentenced.

Obviously, "using" a firearm normally includes and encompasses "carrying" a firearm. It is hard to conceive of different circumstances in a "using" and a "carrying" violation. If permitted to stand, this distinction would lead to unique and inequitable results. A "user" may receive only one conviction and sentence; a "carrier" may receive multiple convictions and consecutive sentences. As to Busic who did not draw or use his weapon, this is the impact on the instant case. This interpretation would be an invitation to prosecutors to seek multiple convictions and consecutive sentences in avoidance of *Simpson* by indicting for the underlying felony and for violation of §924(c)(2) (carrying).

At the very least, Busic seems entitled to the same treatment as LaRocca. However, the factual distinctions between the subsections has only limited impact in this case. Busic's principle contention is that §924(c) does not apply where the underlying offense already contains a sentencing enhancement provision for use of a firearm. This is true not only in the sentencing context of *Simpson*, but in the use of the statute for prosecution.

I.

The Legislative History of §924(c) Establishes that Congrss Did Not Intend the Statute to Apply When the Underlying Federal Offense Provides Enhanced Punishment for Use of a Firearm.

This Court considered *Simpson* to resolve apparent conflicts between the decisions among the circuits. *See* also *United States* v. *Eagle*, 539 F.2d 1166 (8th Cir. 1976), *United States* v. *Crew*, 538 F.2d 575 (4th Cir. 1976), and *Perkins* v. *United States*, 526 F.2d 688 (5th Cir. 1976). The Eighth Circuit's decision in *Eagle* involved the interplay between §924(c) and 18 U.S.C. §1153 (assaulting an Indian on a reservation) which carries an enhanced penalty for using a firearm. Based on the legislative history of §924(c), the *Eagle* court stated:

> "The sections of Title 18 enumerated by Representative Poff (except Chapter 44) have this in common: all impose a higher penalty for the felony specified if that is committed with a 'dangerous' or 'deadly' weapon. Representative Poff's remarks evidence a clear congressional intention that the new statute not be applicable in cases involving statutes of this type.
>
> This intention accords with the deterrence rationable of §924(c)(1). *It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive*

> *statute itself does so* . . . The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of §924(c)(1) to the crime is not necessary, and apparently was not intended by Congress.
>
> We thus conclude that a crime of the type charge in count I, i.e., one for which the penalty is enhanced by the use of a dangerous weapon, *cannot form the basis of a prosecution under §924(c)(1).*" *Eagle*, 539 F.2d at 1171, 1172. (emphasis added)

A reasonable reading of *Simpson* indicates that this Court adopted the *Eagle* rational in evaluating the legislative history of §924(c). Ambiguity arises because the *Simpson* Court remanded the case for further consistent proceedings without expressly vacating the the conviction under §924(c). It should be noted that the *Simpson* petitioners did not ask to have the firearms conviction vacated because such contention would not have been in their best interests. The larger sentences had been imposed for the underlying bank robbery. It remains to evaluate this Court's interpretation of the legislative history of §924(c) to determine whether there is any basis for the Third Circuit's conclusion (and the Government's contention) that the prosecutors and the courts have any "option" to use §924(c).

It is respectfully submitted that nothing could be plainer than what this Court said about the legislative history of §924(c) in *Simpson*. The best vehicle for

expressing this is to set forth this Court's exact language regarding legislative history, omitting only portions relating to other aspects:

> "First is the *legislative history of §924(c).* That provision, which was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff. 114 cong. Rec. 22231 (1968).[7] In his statement immediately following his introduction of the amendment, Representative Poff observed:
>
> > 'For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.' *Id.*, at 22232.

This statement is clearly probative of a legislative judgment that the purpose of §924(c) is already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon.[8] Although these remarks are of

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[7] Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports.

[8] Title 18 U.S.C. §§111, 112, and 2231 provide for an increased maximum penalty where a 'deadly or dangerous weapon' is used to commit the substantive offense. Title 18 U.S.C. §§113(c) and 2114 enhance the punishment available for commission of the substantive offense when the defendant employs a 'dangerous weapon.'

course not dispositive of the issue of §924(c)'s reach, they are certainly entitled to weight, coming as they do from the provision's sponsor. This is especially so because Representative Poff's explanation of the scope of his amendment is in complete accord with, and gives full play to, the deterrence rationale of §924(c). *United States* v. *Eagle*, 539 F.2d, at 1172. Subsequent events in the Senate and the Conference Commmittee pertaining to the statute buttress our conclusion that Congress' view of the proper scope of §924(c) was that expressed by Representative Poff. Shortly after the House adopted the Poff amendment, the Senate passed an amendment to the Gun Control Act, introduced by Senator Dominick, that also provided for increased punishment whenever a firearm was used to commit a federal offense. 114 Cong. Rec. 27142 (1968). According to the analysis of its sponsor, the Senate amendment, contrary to Mr. Poff's view of §924(c), would have permitted the imposition of an enhanced sentence for the use of a firearm, in the commission of any federal crime, even where allowance was already made in the provisions of the substantive offense for augmented punishment where a dangerous weapon is used. *Id.*, at 27143. A Conference Committee, with minor changes, subsequently adopted the Poff version of §924(c) in preference to the Dominick amendment. H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31-32 (1968) . . .

The legislative history of §924(c) is of course sparse, yet what there is—particularly Representative Poff's statement and the Committee rejection of the Dominick amendment—points in

the direction of a congressional view *that the section was intended to be unavailable in prosecutions for violations of §2113(d).* Even where the relevant legislative history was not nearly so favorable to the defendant as this, this Court has steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses.' *Bell* v. *United States*, 349 U.S. 81, 84 (1955); *Ladner* v. *United States*, 358 U.S. 169 (1958). See *Prince* v. *United States*, 352 U.S. 322 (1957). As we said in *Ladner*: 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' 358 U.S., at 178. If we have something 'more than a guess' in this case, that something—Representative Poff's commentary and the Conference Committee's rejection of the Dominick amendment—is incremental knowledge that redounds to petitioners' benefit, not the Government's.

. . . Indeed, at one time, the Government was not insensitive to these concerns respecting the availability of the additional penalty under §924(c). In 1971, the Department of Justice found the interpretive preference for specific criminal statutes over general criminal statutes of itself sufficient reason to advise all United States Attorneys not to prosecute a defendant under §924(c)(1) where the substantive statute the defendant was charged with violating already 'provid(ed) for increased penalties where a firearm is used in the penalties where a firearm is used in

the commission of the offense.' 19 U.S. Attys. Bull. 63 (U.S. Dept. of Justice, 1971).

Obviously, the Government has since changed its view of the relationship between §§924(c) and 2113(d). We think its original view was the better view of the congressional understanding as to the proper interaction between the two statutes. Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c). The cases are therefore reversed and remanded to the Court of Appeals for proceedings consistent with this opinion." *Simpson*, 435 U.S. at 13-16. (emphasis added).

II.

In the Absence of Clear Legislative History Permitting Multiple Prosecutions and Punishments for a Single Act, Such Multiple Prosecutions and Punishments Are Prohibited.

As in *Simpson*, this type of case raises substantial Double Jeopardy issues. *See Brown* v. *Ohio*, 432 U.S. 161 (1977); *Jeffers* v. *United States*, 432 U.S. 138 (1977); *Iannelli* v. *United States*, 420 U.S. 770 (1975); *Gore* v. *United States*, 357 U.S. 386 (1958); *Blockburger* v. *United States*, 285 U.S. 299 (1932) There is a possible need to evaluate the statutes in the light of *Blockburger* and subsequent cases.

However, as in *Simpson*, such analysis seems unnecessary in view of the consistent practice of this Court to avoid Double Jeopardy decisions (or other

Constitutional decisions) where possible by determining whether Congress *intended* to subject a defendant to multiple convictions and penalties for a single criminal transaction. *Simpson* did not reach the Constitutional issues because of the Court's conclusions as to legislative intent. The Court stated three grounds: 1) The legislative history reflects the judgment that the purposes of §924(c) are already served when the substantive federal offense provides enhanced punishment for use of a dangerous weapon; 2) Any ambiguity concerning the ambit of a criminal statutes should be resolved in favor of lenity; 3) Precedence is given to the terms of a more specific statute where general and specific statutes speak to the same concern.

All three considerations apply to this case and apply not only to bar multiple sentences but prosecution as well. In cases involving Double Jeopardy issues, this Court normally requires a strong and persuasive showing of legislative intent. It is unclear whether this practice of construction arises from the nature of the Double Jeopardy clause, or as a matter of policy pertaining to the function of the Court in the judicial process.[2] In *Simpson* and in other cases, the Court has characterized this as a rule of lenity. *See* also

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[2] *See* "Toward a General Theory of Double Jeopardy" by Peter Westen and Richard Drubel, *Supreme Court Review* (1978). The authors suggest this practice arises from the Double Jeopardy clause itself rather than a matter of policy. This article contains a comprehensive review of all facets of Double Jeopardy law with suggestions for future development.

Gore v. *United States; Supra; Callanan* v. *United States*, 364 U.S. 587, 596. This process requires a clear showing of congressional intent and such intent will not be discerned when there is nothing more to support it than a "guess". *Ladner* v. *United States*, 358 U.S. 169 (1958). *See* also *Bell* v. *United States*, 349 U.S. 81, 84.

The case of *Jeffers* v. *United States*, 432 U.S. 137 (1977) and *Iannelli* v. *United States*, 420 U.S. 770 (1975) are instructive. In *Jeffers*, the defendant was tried and convicted on charges of conspiracy to distribute drugs and with distributing drugs in concert with five or more persons. After conviction, the defendant was given multiple sentences which exceeded the maximum for the greater offense. A plurality of this Court set aside the conviction because of the absence of legislative intent to permit separate punishments. The plurality termed the legislative history "inconclusive". *See Jeffers* v. *United States*, 432 U.S. 137 (1977).

In *Iannelli*, this Court permitted multiple punishments for conspiracy to commit gambling violations and for the substantive violations of engaging in gambling enterprise with five or more persons. This was contrary to Wharton's Rule which appeared to bar conspiracy conviction where the substantive crime requires the participation of two or more persons. This Court found a "clear and unmistakable" legislative intent that the conspiracies and substantive violations could be punished as multiple offenses. 420 U.S.

at 785, 786. For the most part, the above discussion relates to multiple sentences. However, it is clear that the rule of lenity applies to the scope and applicability of statutes for prosecution purposes. This Court has so held. *United States* v. *Bass*, 404 U.S. 336, (1971), *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

III.

The Same Legislative History Which Precludes Multiple Punishment Under §924(c) Also Bars Prosecution.

In this case, it cannot be said that there is any showing of a clear intent to permit multiple sentences (or even convictions). This Court has established this in *Simpson*. To the contrary, the *Simpson* court cites and relies upon abundant evidence that the congressional intent was to *prohibit* separate prosecution *and* sentence. Representative Poff made his statement for the purpose of legislative history. His statement could not have been more explicit. Thus, two conclusions must be reached: 1) The Government *cannot* show clear congressional intent to permit multiple prosecutions and sentences; 2) The legislative history as accepted by this Court establishes exactly the opposite and, if applied, bars not only multiple sentences but prosectuion.

Of course, *Simpson* concerns the sentencing context and the instant case concerns prosecution itself. Regardless of any differences in context, the legislative history goes precisely to the same point. There can be

no showing of congressional intent to permit multiple punishments because the legislative history shows the express intent that §924 cannot be used to prosecute in any case already covered by a statute containing a sentencing enhancement provision.

CONCLUSION

For the foregoing reasons, it is hereby requested that this Honorable Court vacate petitioner Michael M. Busic's conviction for 18 U.S.C. §924(c)(2).

Respectfully submitted,

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Supreme Court, U. S.
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Nos. 78-6020 and 78-6029

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL M. BUSIC, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LAROCCA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (App. 36-54, 57-60) are reported at 587 F.2d 577. The opinion of the district court (App. 21-34) is not reported.

JURISDICTION

The judgment of the court of appeals (App. 55-56) was entered on January 5, 1978; thereafter, the government's petition for rehearing was granted, and the judgment on rehearing (App. 61) was entered on December 12, 1978. The petition for a writ of certiorari in No. 78-6020 was filed on January 10, 1979, and the petition for a writ of certiorari in No. 78-6029 was filed on January 11, 1979. The petitions were granted and the cases consolidated on June 4, 1979 (App. 62, 63). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sentence may be imposed under 18 U.S.C. 924(c) where the statute creating the predicate felony permits an enhanced penalty for use of a dangerous weapon, but the enhancement provision is not invoked and thus the defendant's punishment is not doubly enhanced because of his use of a firearm (No. 78-6029).

2. Whether, in the circumstances of this case, consecutive sentences may be imposed for aiding and abetting a co-conspirator's assault with a deadly weapon (a firearm) upon a federal officer, in violation of 18 U.S.C. 2 and 111, and for unlawfully carrying a second firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2) (No. 78-6020).

3. Whether, in the event the Court vacates petitioners' Section 924(c) sentences, the disposition of

the case that would be "just under the circumstances" (28 U.S.C. 2106) would be to remand to the district court for re-sentencing on the Section 111 counts, subject to the restriction that the re-sentence not exceed the sentence petitioners originally received for the armed assault offenses under Sections 924(c) and 111.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 924(c) provides:

> Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States[,]
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any

other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. 111 provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on five counts of narcotics offenses, in violation of 21 U.S.C. 841(a)(1), 843(b), and 846 (Counts 1-5), and on six counts of unlawful possession of firearms, in violation of 26 U.S.C. 5861 (c) and (d), 5871, and 18 U.S.C. 922(h) and 924 (a) (Counts 8-13).[1] Petitioners were also convicted

[1] Petitioner Busic was not charged in Count 12. Busic was also convicted on three additional counts of unlawful possession of firearms, in violation of 18 U.S.C. 1202(a)(1) (Counts 14-16). Both Busic and LaRocca had previously been convicted of firearm and assault felonies (App. 11-14).

on two counts of armed assault on federal officers, in violation of 18 U.S.C. 2 and 111 (Counts 6 and 7). In addition, petitioner Busic was convicted of unlawfully carrying a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(2) (Count 18), and petitioner LaRocca was convicted of using a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(1) (Count 19).

Petitioners were each sentenced to a total of 30 years' imprisonment, apportioned as follows: concurrent terms of five years' imprisonment on Counts 1 through 4, with special parole terms on each count ranging from two to three years, and of four years' imprisonment on Count 5; five years' imprisonment on Counts 6 through 13, to be served concurrently with each other but consecutively to the sentences on Counts 1 through 5; petitioner Busic was also sentenced to terms of two years' imprisonment on Counts 14 through 16, to be served concurrently with each other and with the sentences imposed on Counts 6 through 13, and to 20 years' imprisonment on Count 18, to be served consecutively to all other terms; petitioner LaRocca was sentenced to 20 years' imprisonment on Count 19, to be served consecutively to all other terms.

The evidence at trial showed that Charles D. Harvey, an undercover agent of the Drug Enforcement Administration, first met petitioners on May 7, 1976, at the home of Richard Hervaux, a government informant. At that time petitioners agreed with Har-

vey that he would accompany them to Florida to purchase drugs from one of their suppliers for re-distribution in the Pittsburgh area. Several days later, Harvey again met with petitioners and received samples of the marijuana and cocaine that he was to purchase from their Florida source. The next day, after Harvey had arranged for his trip to Florida, LaRocca called him and insisted on seeing some "front money." A meeting was set for the following day in the parking lot of a shopping center in Monroeville, Pennsylvania (App. 38).

After he arranged for surveillance, Harvey went to the shopping center with $30,000 in cash, as agreed. Petitioners were already there in LaRocca's car. LaRocca entered Harvey's car, and the two drove to the other side of the parking lot. As Harvey withdrew the money from the trunk, LaRocca reached for his gun. Harvey ran, but LaRocca caught him and pointed his gun at Harvey's chest. At that point Harvey gave a pre-arranged signal to the surveillance agents; as the agents began to converge on the scene, LaRocca fired at Harvey and missed. LaRocca then fired two shots at the vehicle containing agents Alfree and Petraitis of the Bureau of Alcohol, Tobacco, and Firearms, and two shots at the vehicle containing agent Macready of the DEA. LaRocca was immediately arrested and disarmed (App. 38-39).

The officers also arrested Busic, who had been leaning on a nearby car during the shootout. Upon his arrest, Busic exclaimed, "Remember, I didn't shoot at anybody and I didn't pull my gun" (Tr. 41).

Busic was thereupon searched, and a pistol was found in his belt. A search of LaRocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. An inventory search of the car conducted the following day disclosed yet another pistol under the driver's seat and another box of ammunition in the glove compartment (App. 39).

In an opinion issued prior to the decision of this Court in *Simpson* v. *United States*, 435 U.S. 6 (1978), the court of appeals held that 18 U.S.C. 924(c)(1) is applicable to a defendant who is also charged with aggravated assault of a federal officer under 18 U.S.C. 111 (App. 41-43). It further held, however, that when the deadly weapon used in the Section 111 assault is a firearm and the felony charged under Section 924(c)(1) is the assault that forms the basis of the charge under Section 111, sentencing the defendant on both counts would violate the Double Jeopardy Clause (*id.* at 43-47). Accordingly, the court of appeals remanded petitioner LaRocca's case to the district court for resentencing under either Section 111 or Section 924(c)(1), at the government's election, but not both (App. 47). In contrast, the court affirmed petitioner Busic's convictions because it concluded that a prosecution for unlawfully carrying a weapon during the commission of a felony under 18 U.S.C. 924(c)(2) requires proof of an element—the unlawful possession of a firearm—that is not an element of the offense under Section 111 (App. 47-48).

Following this Court's decision in *Simpson*, the court of appeals granted a petition for rehearing, vacated the portion of its first opinion dealing with the Double Jeopardy Clause, and reached the same disposition of the case by applying the rationale of this Court's opinion in *Simpson* (App. 57-60). The court of appeals concluded (*id.* at 59-60) that *Simpson* prohibits sentencing a defendant under both Section 111 and Section 924(c)(1), but that the government has the option of proceeding under either section; accordingly, it remanded LaRocca's case for resentencing, in the discretion of the government, under either Section 111 or Section 924(c)(1).[2] The court found the rationale of *Simpson* inapplicable to Busic's conviction under Section 924(c)(2) for unlawfully carrying a firearm during the commission of a felony, and it affirmed that conviction (*id.* at 60).

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[2] The court of appeals, both in its original opinion (App. 47 n.5) and again on rehearing (App. 60 n.3), rejected the government's alternative argument that LaRocca's conviction under Section 924(c) could be upheld on the ground that petitioners' firearms were carried and used not only in the commission of the assault offense, but also in the commission of the narcotics conspiracy of which the jury had convicted them. The court concluded that "[i]t is a fair inference from the record that the conspiracy to distribute drugs terminated as of the time that [petitioners] decided to rob Harvey" and that "the jury was entitled to convict [petitioners] on these [conspiracy] counts even if it found that the conspiracy was shorter in duration than was charged in the indictment" (App. 47 n.5). We do not press that argument in this Court, and thus it can be assumed that the predicate felony for petitioners' convictions under Section 924(c) was the assault on federal officers.

SUMMARY OF ARGUMENT

In *Simpson* v. *United States*, 435 U.S. 6 (1978), this Court held that in a prosecution for a bank robbery committed with firearms "where the Government relied on the same proofs to support the convictions under [18 U.S.C. 924(c) and 18 U.S.C. 2113(d)]" (435 U.S. at 12), Congress did not intend "to authorize, * * * not only the imposition of the increased penalty under § 2113(d), but also the imposition of an additional consecutive penalty under § 924(c)" (435 U.S. at 8). The Court found that the legislative history of Section 924(c), although "sparse" (435 U.S. at 15), "points in the direction of a congressional view" (*ibid.*) that cumulative penalties under Section 924(c) were not to be imposed when the defendant had already received an enhanced sentence under Section 2113(d) for the same conduct. The Court also concluded that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(d) would violate the established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" (435 U.S. at 14; citation omitted).

I

In No. 78-6029, petitioner LaRocca presents the question whether a defendant who uses a firearm to assault a federal officer may be sentenced, at the discretion of the government, either under 18 U.S.C. 924(c)(1) or under the enhancement provision of 18 U.S.C. 111. While we acknowledge that the hold-

ing in *Simpson* would bar an enhanced sentence under Section 111 for armed assault and an additional, cumulative sentence under Section 924(c)(1) for use of the same firearm, *Simpson* does not resolve the distinct question whether sentence may be imposed under Section 924(c)(1) when the defendant is not sentenced to the enhanced penalty provided in Section 111. In our view, "[t]he overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text" (*Board of Education of the City of New York* v. *Harris*, No. 78-873 (Nov. 28, 1979), slip op. 10) of Section 924(c) all support the court of appeals' decision that a defendant can be sentenced, at the government's election, either under Section 924(c) or under the enhancement provision of the predicate felony.

The language of Section 924(c) unambiguously states that it applies to all federal felonies, and no exception is made for felonies that have their own enhancement provision for using a dangerous weapon. In addition, the penalties provided in Section 924(c) were specially designed to deter firearm violations and are qualitatively and quantitatively different from those contained in Section 111. Under Section 924(c), the sentence imposed for the firearm offense cannot be concurrent to the sentence for the predicate felony and, in cases of repeat offenders, the defendant cannot receive probation or a suspended sentence. None of these restrictions is applicable to a sentence under Section 111. Likewise, Section 924(c) provides a minimum mandatory sen-

tence of one year's imprisonment, and a maximum of 10 years' imprisonment, for a defendant convicted of his first firearm offense; for repeat offenders, the mandatory minimum term of imprisonment is two years, with a maximum of 25 years. Section 111, on the other hand, provides a sentence of no more than 10 years' imprisonment for an armed assault of a federal officer (an enhanced penalty of only seven years above the maximum term of three years for simple assault), requires no mandatory minimum sentence, and makes no provision for increased sentences for recidivists. Given these differences in the penalty structures, it is highly unlikely that Congress intended that a defendant who used a firearm to assault a federal officer would be completely exempt from sentence under Section 924(c) and would be subject only to the lesser punishment provided in Section 111. A contrary conclusion in this case, unlike in *Simpson*, would not "give[] full play to[] the deterrence rationale of § 924(c)" (435 U.S. at 14). Moreover, acceptance of petitioners' construction of Section 924(c) would lead to the improbable results, again not likely to have been intended by Congress, of punishing more leniently (a) the use of a firearm to assault a federal officer than the use of the same firearm to commit virtually any other federal felony, and (b) the actual use of the firearm to commit an assault than unlawfully carrying (but not using) the firearm during the commission of an assault.[3]

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[3] Prior to enactment of Section 924(c), the offenses of bank robbery and assault on a federal officer were singled out from the entire panoply of federal offenses as ones requiring spe-

The legislative history of Section 924(c) further supports the view that Congress intended defendants who use firearms to assault federal officers would be subject to the stiff penalties specified in that provision. The Gun Control Act of 1968 in general, and Section 924(c) in particular, were enacted to increase both the deterrence and the punishment of firearm offenses. These objectives were forcefully advanced by Congressman Poff, who introduced the floor amendment that was substantially enacted as Section 924(c), and his proposal was specifically designed to increase both the certainty and the length of imprisonment for firearm offenders. While Congressman Poff did state, in a passage heavily relied on in *Simpson*, that his amendment "is not intended to apply to title 18, section[] 111 * * * which already define[s] the penalties for the use of a firearm in assaulting officials" (114 Cong. Rec. 22232 (1968)), it is inconceivable that he intended by this statement that defendants who used firearms to assault federal officers would be exempt altogether from the specific and strict penalty scheme of Section 924(c).

We do not believe that Congressman Poff was addressing himself to the question (which was not raised in the debates) whether Section 924(c) could be invoked *in lieu of* the enhancement provisions in

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cial deterrents, in the form of increased penalties, to the use of firearms in their commission. It defies reason to suppose that in 1968, when Section 924(c) was enacted, Congress completely reversed its field and concluded that the offenses for which more severe penalties had previously been applied should thereafter be treated with special leniency.

existing law for using dangerous weapons. It is one thing to conclude on the basis of this statement, as the Court did in *Simpson*, that Congress did not intend to permit the double enhancement of sentences where a defendant is charged and convicted under both Section 924(c) and the aggravated offense provisions of Sections 111 or 2113; it is quite a different matter, however, to determine that Congress meant to foreclose the prosecutor from charging, and the court from sentencing, under the penalty provisions of Section 924(c) at all.

Moreover, Congressman Poff expressly recognized that existing law was inadequate to deter and punish crimes involving the use of firearms. Indeed, Congressman Poff voted against the Conference Report, even though it adopted his amendment in large measure, because it modified his proposal by deleting the prohibition on concurrent sentences and limiting to repeat offenders the ban on probation and suspended sentences. In light of his clear and strongly held position on the need for more severe penalties for firearm offenses and his vote against the Conference Report because it weakened certain sentencing provisions in his amendment, we submit it is highly unlikely that Congressman Poff intended that armed assaults on federal officers be punished solely under the existing enhancement provision of Section 111—a provision that not only has lesser terms of incarceration than Section 924(c), but also contains no restrictions against suspended or concurrent sentences or probation. The legislative history contains no suggestion

that Congressman Poff did not fully expect that defendants who used firearms to assault federal officers would be subject to the stringent penalties under Section 924(c) that were specifically enacted to curb firearm offenses.

Since the text and legislative history of Section 924(c) clearly show that its penalty provisions were intended to be applicable here, there is no occasion to resort to the rule of lenity. "[I]n the instant case there is no ambiguity to resolve. * * * Where, as here, 'Congress has conveyed its purpose clearly, * * * we decline to manufacture ambiguity where none exists.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7, quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978).

II

In No. 78-6020, petitioner Busic contends that *Simpson* prohibits the imposition of consecutive sentences for an armed assault on a federal officer, in violation of the enhancement provision of 18 U.S.C. 111, and for unlawfully carrying a firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2). In the circumstances of the present case, this contention is without merit. Petitioner Busic was convicted and sentenced under 18 U.S.C. 2 and 111 for aiding and abetting LaRocca's use of a firearm to assault federal officers; Busic was sentenced to an enhanced penalty under Section 111 because LaRocca, aided and abetted by Busic, had used a firearm. In addition, Busic was also convicted and sentenced under Section 924(c)(2) for unlawfully carrying (but not using) a second firearm during the commission of that assault. Busic's two consecutive sentences on these convictions are thus based on two separate firearms; Busic is directly liable for unlawfully carrying his own gun and is vicariously liable as an aider and abettor for LaRocca's use of a firearm. Nothing in *Simpson* remotely precludes this result.

Nor do these consecutive sentences violate the Double Jeopardy Clause. Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), each of the offenses under 18 U.S.C. 2 and 111 and 18 U.S.C. 924(c)(2) plainly "requires proof of a fact which the other does not." Furthermore, since the two offenses in this case related to separate firearms, the government was required to prove as independent facts that a different firearm was involved in each count; proof regarding the firearm in one offense did not serve to satisfy any of the elements of the other offense. See *Brown* v. *Ohio*, 432 U.S. 161, 167 n.6 (1977). Accordingly, the Double Jeopardy Clause does not bar Busic's consecutive sentences.

III

In the event the Court disagrees with our principal contention and vacates petitioners' sentences under Section 924(c), we submit that the disposition of the case that would be "just under the circumstances" (28 U.S.C. 2106) would be to remand for re-sentencing on the Section 111 counts, subject to the restriction that the re-sentence could not exceed the sentences petitioners originally received for the armed assault offenses under Sections 924(c) and 111.

Petitioners were each convicted on more than a dozen felony counts, including, as relevant here, two armed assaults on federal officers. Prior to the decision in *Simpson* v. *United States*, petitioners were sentenced to 25 years' imprisonment for these armed assaults—20 years' imprisonment under Section 924 (c), and five years' imprisonment under Section 111 (concurrent with other terms of incarceration that are unaffected by this appeal). Petitioners' armed assaults on federal officers—whether denominated as violations of Section 924(c), or of Section 111, or both—plainly warrant the severe condemnation and punishment ordered by the district court. However, if this Court overturns petitioners' Section 924(c) sentence but does not remand for re-sentencing on the Section 111 counts, only a five-year term of imprisonment would be imposed for the armed assault offenses. Such an unforeseen and undeserved windfall to petitioners should not be countenanced.

The Double Jeopardy Clause does not bar such resentencing. As this court has recognized in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Bozza* v. *United States*, 330 U.S. 160 (1947), the Double Jeopardy Clause does not in all situations protect a defendant from receiving a greater sentence than was initially imposed. In particular, we submit that the Double Jeopardy Clause does not require the Court to ignore the important "societal interest in punishing one whose guilt is clear" (*United States* v. *Tateo*, 377 U.S. 463, 466 (1964)) and in ensuring that such punishment is commensurate with the character of

the defendant and the nature and severity of his criminal conduct. In the instant case, petitioners' original sentences under Section 924(c) and Section 111 derive from the same armed assaults on federal officers, petitioners have initiated the appellate proceedings that give rise to the need for re-sentencing, and the re-sentencing we advocate would not exceed the sentence for the armed assault offenses that petitioners initially received. In these circumstances, it cannot be said in any meaningful sense that re-sentencing would be "an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect" (*United States* v. *Scott*, 437 U.S. 82, 91 (1978)) or would subject petitioners to "multiple punishments for the same offense" (*North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717).

ARGUMENT

I. A DEFENDANT WHO USES A FIREARM TO COMMIT AN ASSAULT UPON A FEDERAL OFFICER MAY BE SENTENCED, AT THE GOVERNMENT'S ELECTION, UNDER EITHER THE AGGRAVATED ASSAULT PROVISION OF 18 U.S.C. 111 OR THE FELONY-FIREARM PROVISION OF 18 U.S.C. 924 (c)(1)

A. Section 924(c) By Its Terms Applies To Felonies That Provide An Enhanced Penalty For The Use Of A Dangerous Weapon.

This Court has repeatedly recognized that the primary guide to the meaning of a statute is its text. See, *e.g.*, *Perrin* v. *United States*, No. 78-959 (Nov. 27, 1979), slip op. 5; *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 4; *Touche Ross & Co.* v.

Redington, No. 78-309 (June 18, 1979), slip op. 7-8; *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6; *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 3-4; *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Scarborough* v. *United States*, 431 U.S. 563, 569 (1977); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 200-201 (1976); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). Here, the language defining the offense in Section 924(c) clearly supports our position that a defendant may be sentenced under that provision notwithstanding that the predicate felony provides, as an alternative to Section 924(c)(1), an enhanced penalty for using a dangerous weapon. Section 924(c) on its face states plainly that it applies to anyone who "uses a firearm to commit *any felony* for which he may be prosecuted in a court of the United States" and that such a person "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years" (emphasis added).[4] A felony for such purposes is defined by 18 U.S.C. 1(1) as "[a]ny offense punishable by death or imprisonment for a term exceeding one year," a definition that clearly includes assaulting a

[4] More severe sanctions are imposed upon a second or subsequent offender, who faces a sentence of at least two and as many as 25 years' imprisonment.

federal officer in violation of 18 U.S.C. 111. Thus, while it does not speak to the double enhancement issue presented in *Simpson*, Section 924(c) by its terms does authorize sentencing pursuant to its provisions for the commission of a federal felony with a firearm regardless of whether the predicate felony contains an enhancement provision for the use of a firearm or other dangerous weapon.

B. The Sentencing Provisions Of Section 924(c) Demonstrate Congress' Intent That Punishment Be Imposed In Accordance With The Terms Of That Statute Notwithstanding That The Predicate Felony Contains An Enhanced Penalty For The Use Of A Dangerous Weapon.

This construction—that sentence may be imposed under Section 924(c) even where the underlying felony provides an enhanced penalty for the use of a dangerous weapon—is supported by the sentencing provisions of Section 924(c). Instead of merely authorizing imposition of longer terms of incarceration than can be imposed under the various enhancement statutes, Section 924(c) establishes mandatory minimum sentences, requires increasingly severe sentences for recidivists (without possibility of suspension or probation), and prohibits concurrent sentencing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence and may receive a 10-year consecutive sentence, while a repeat offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a

consecutive 25-year sentence.[5] By contrast, neither Section 111 nor Section 2113(d) prescribes mandatory minimum sentences or prohibits concurrent sentences, suspended sentences or probation. Moreover, the maximum sentence of 10 years' imprisonment under the enhancement provision of Section 111 is only seven years greater than the maximum sentence for simple assault, and no increased penalty is provided for second or subsequent offenders.[6]

In our view, it is most unlikely that Congress intended to subject persons who commit armed assaults on federal officers to lesser penalties, and thus to a lesser deterrent, than all other gun-wielding felons. Having specifically studied the firearm problem, Congress responded by enacting the strict, and unique, sentencing provisions of Section 924(c) in order to deter and punish more severely the incidence of firearm offenses. No reason suggests itself why Congress conceivably would have exempted from this specific

[5] As we discuss below (pages 24-37, *infra*), these comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use of a firearm in the commission of a felony—risks that Congress could legitimately have concluded are more serious than the risks attending the use of any other dangerous weapon, which would be sufficient to trigger the enhancement provision of Section 111.

[6] Similarly, the maximum sentence for aggravated bank robbery under Section 2113(d) is only five years greater than the maximum for simple bank robbery, whether or not the robber is a recidivist. In contrast, under Section 924(c), the use of a gun in the commission of the robbery would subject the defendant to an additional sentence of up to 10 years for a first offense and up to 25 years for a second offense. See *United States* v. *Brown*, 602 F.2d 909, 912 & n.2 (9th Cir. 1979).

firearm legislation those defendants who use such firearms to commit federal felonies that have their own enhancement provisions for the use of dangerous weapons.[7] Petitioners' construction of Section 924(c) has the perverse consequence of rendering the stiff penalty provisions that Congress enacted to deter the increasing use of firearms inapplicable to the very class of offenses—including assault on a federal officer and bank robbery—where Congress had already found that enhanced penalties were needed to deter and punish those who used dangerous weapons. Unlike in *Simpson*, where the Court found that double enhancement of punishments was not necessary to promote the statutory objectives, it cannot be concluded in the present case that petitioners' argument "is in complete accord with, and gives full play to, the deterrence rationale of § 924(c)" (435 U.S. at 14).

Nor is it possible fairly to conclude that Congress intended (or that the language of the statute should be ignored in order to bring about) the irrational re-

[7] Indeed, the principle of giving "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern"—on which the Court relied in *Simpson* (435 U.S. at 15)—suggests that in a case where a firearm is employed in the commission of a bank robbery or an assault on a federal officer, the more specific firearm provision in Section 924(c) should be given precedence over a more general enhancement provision for dangerous weapons. Moreover, Section 924(c), which was enacted in 1968, long after the enhancement provisions of Section 111 or Section 2113, more fairly reflects the contemporary congressional view of the gravity of the use of firearms in the commission of federal felonies. See page 43 *infra*.

sults that would follow from petitioners' construction of Section 924(c), some of which may be illustrated by the following examples:

(a) John Doe assaults a federal officer, threatening him with a knife; Richard Roe assaults a federal officer with a firearm, shooting him and wounding him severely. Both are subject only to the penalties provided by Section 111, which allows seven years' enhancement for the use of any dangerous weapon. This result does not square with the intent of Congress in enacting Section 924(c) to punish with special severity the criminal use of firearms.

(b) John Doe burglarizes a post office (18 U.S.C. 2115), using a firearm to shoot the lock off the door; Richard Roe robs a bank with a firearm, firing a number of shots at patrons and employees of the bank, seriously wounding several. Doe is subject to ten years' imprisonment under Section 924(c), Roe only to an enhanced penalty of five years' under Section 2113(d). Congress could not rationally have intended such a discrepancy simply because Roe used his firearm to rob a bank.

(c) Continuing their criminal careers, Doe and Roe together use firearms to hijack an interstate shipment (18 U.S.C. 659). As a second offender under Section 924(c), Doe is subject to an additional penalty of a minimum of two years and as much as 25 years' punishment, which may not be suspended or made concurrent with the sentence for the theft. Roe, on the other hand, although having committed two prior crimes of violence employing firearms (as compared

to one firearm crime involving no danger to individuals by Doe), must be treated as a first offender under Section 924(c), subject to a maximum term of 10 years' imprisonment, 15 years less than that applicable to Doe, and eligible for a concurrent sentence or probation on the firearm charge. Again, it is impossible to square the more lenient treatment of Roe, who has a more serious history of firearms abuse, with the manifest congressional goal of punishing such abuse severely.

(d) Doe robs a bank, unlawfully carrying but not using a firearm; Roe robs a bank, using a firearm. If we are correct that Section 924(c) is applicable to one who unlawfully carries (but does not use) a firearm during the commission of a felony that provides an enhanced penalty for using a dangerous weapon,[8] Doe is subject to the more severe penalties

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[8] Taken literally, petitioner Busic's contention that Section 924(c) does not apply when the underlying felony provides enhanced punishment for the use of a firearm (78-6020 Br. 9) would mean that a defendant could not be punished under Section 924(c)(2) for unlawfully carrying a firearm during a bank robbery or an assault on a federal officer. However, since the enhancement provisions of those offenses do not penalize carrying, but not using, a dangerous weapon, the end result would be that a defendant who unlawfully carries a firearm would receive no enhanced sentence and would be subject to the same punishment as a defendant who committed the offense without carrying a firearm. Such an unsupportable result would be directly contrary to Congress' establishment of a separate offense in Section 924(c)(2) for unlawfully carrying a firearm during the commission of a federal felony, and would ignore the express congressional purpose in adding Section 924(c) to the Gun Control Act "to

of Section 924(c) and Roe, whose offense is plainly more serious, is not. This inconsistency again flies in the face of the clear legislative purpose of Congress in enacting Section 924(c).

Rather than attributing such untenable results to the Congress, we believe that Section 924(c) should be interpreted, in accord with its clear language, to allow sentences to be imposed under its provisions even though the predicate felony contains an enhanced penalty for the use of a dangerous weapon.

C. The Legislative History Of Section 924(c) Confirms That The Sentencing Provisions Of That Statute Are Applicable Even Though The Underlying Felony Provides An Enhanced Penalty For The Use Of A Dangerous Weapon.

The Gun Control Act of 1968 (Pub. L. No. 90-618, 82 Stat. 1213), of which Section 924(c) is a part, was enacted largely in response to a single concern:

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persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968) (remarks of Congressman Poff). Even Congressman Poff's statement that Section 924(c) "is not intended to apply" to 18 U.S.C. 111 or 18 U.S.C. 2113 (114 Cong. Rec. 22232 (1968)), upon which the Court heavily relied in *Simpson* (435 U.S. at 13-14), was limited to those statutes that provided an enhanced penalty for the *use* of a firearm. Thus, there is no basis for imputing to Congress the loophole that would exist if the penalties under Section 924(c)(2) for unlawfully carrying a firearm are not applicable to those federal felonies, such as Sections 111 and 2113, that contain an enhancement provision for using a dangerous weapon.

the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime" (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)). The worsening crime situation in recent years had aroused considerable attention and alarm in Congress. During 1967, Congress held extensive hearings on crime control legislation, including proposed gun control bills, in which frequent references were made to the fact that in 1965 firearms were used in approximately 5,600 murders, 34,700 aggravated assaults, and the vast majority of the 68,400 armed robberies, and that guns killed all but 10 of the 278 law enforcement officers murdered in the preceding five years.[9] More recent and even more troubling statistics on the use of firearms in violent crime were cited in Attorney General Clark's letter to Congress requesting adoption of the Gun Control Act (H.R. Rep. No. 1577, *supra*, at 18-20) and in the Senate and House Judiciary Committee Reports on the Act (*id.* at 7-8; S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

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[9] These figures were set forth in the Report by the President's Commission on Law Enforcement and Administration of Justice, published in February 1967 as *The Challenge of Crime In A Free Society* 239. See *Anti-Crime Program: Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 213, 241, 261 (1967). The Crime Commission's Report was also considered by the Senate Judiciary Committee in connection with the legislation eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess. 31 (1968). The Committee Report on that bill cited further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission Report (*id.* at 76).

Congress confronted the danger revealed by these figures with a two-pronged approach. First, it expanded federal control over the sale and shipment of firearms across state lines by prohibiting gun sales to out-of-state purchasers and to minors and by forbidding their purchase through interstate mail orders. See 18 U.S.C. 922. Second, it attacked the crime problem directly by punishing the use and unlawful carrying of firearms in the commission of serious crimes. Section 924(c), introduced and adopted on June 19, 1968, was addressed to the second objective.[10]

The language that became Section 924(c) was offered by Congressman Poff as a substitute for a floor amendment made by Congressman Casey to the House version of the Gun Control Act. 114 Cong. Rec. 22231 (1968).[11] The Casey amendment had pro-

[10] Because the statute was introduced on the floor of the House and approved on the same day, there are no legislative hearings and no committee reports concerning it; the pertinent legislative history is contained in a few pages of the Congressional Record and consists primarily of the views of supporters of the House bill and its Senate counterpart. See *Simpson* v. *United States*, 435 U.S. 6, 13 n.7 (1978).

[11] As introduced, the Poff amendment provided:

* * * * *

(c) Whoever—

(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

vided stiff minimum penalties for anyone who, "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce" (*id.* at 22229).[12] Supporters of the Poff substitute noted that the Casey language applied to the use or possession of firearms in state as well as federal felonies, and would thereby convert thousands of state offenses into federal violations. This result was criticized both as an intrusion

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years. The execution or imposition of any term of imprisonment imposed under this subsection may not be suspended, and probation may not be granted. Any term of imprisonment imposed under this subsection may not be imposed to run concurrently with any term of imprisonment imposed for the commission of such felony.

Some modifications concerning the penalty provisions of the Poff proposal were subsequently adopted. See page 34 & note 16, *infra*.

[12] The text of the Casey amendment provided:

That whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned—

(1) in the case of his first offense, for not less than ten years;

(2) in the case of his second or more offense, for not less than twenty-five years.

upon state jurisdiction and as the source of an unmanageable load of criminal cases in the federal system. *Id.* at 22232-22235. Other Congressmen felt that the provision violated principles of due process and equal protection or that the burden of proving the jurisdictional nexus unacceptably weakened the amendment. *Id.* at 22231 (remarks of Congressman Poff); *id.* at 22233 (remarks of Congressman Cramer).

The substitute amendment presented by Congressman Poff was intended to cure the perceived defects in the Casey proposal by making it a separate federal offense to use or unlawfully carry a firearm during the commission of "any felony which may be prosecuted in a court of the United States" (*id.* at 22231). In introducing his substitute, Congressman Poff made clear his intention to strengthen, not weaken, the Casey proposal (*ibid.*):

> [M]y amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment.
>
> * * * Indeed, the substitute is stronger. The substitute provides that the penalties cannot be suspended and that probation cannot be granted. The Casey amendment contains no such provision.
>
> My substitute is also stronger in that it compels the court to impose the sentence to run consecutively upon the penalty previously imposed for the basic crime. The Casey amendment permits the court to make the two penalties run concurrently and to suspend any part or all of either or both.

In addition, in an ensuing discussion with Congressman Cramer, Congressman Poff emphasized that his amendment would broaden the range of federal felonies to be covered by the statute (*id.* at 22233):

> MR. CRAMER. * * *
>
> Thirdly, and really what bothers me the most, is that the Casey amendment does not cover an adequate number of crimes, including Federal crimes. It does not even cover the large number of heinous Federal crimes to which the amendment offered by the gentleman from Virginia [Mr. Poff] would apply; is that correct?
>
> MR. POFF. My amendment would apply to all Federal felonies including heinous crimes in all grades, down to the lowest level of a felony.
>
> * * * * *
>
> MR. CRAMER. * * *
>
> And in the list of crimes the gentleman referred to three or four pages there, any number of those heinous crimes are not included under the Casey amendment; is that correct?
>
> MR. POFF. That is correct.
>
> * * * * *
>
> MR. POFF. Insofar as it is defined in the Federal code as a felony itself, it would be included [in the Poff amendment].[13]

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[13] See also 114 Cong. Rec. 22232 (1968) (emphasis added):

> MR. ICHORD: * * *
>
> * * * * *
>
> Are you contemplating—the gentleman makes it a Federal offense, another separate Federal offense to use

Despite the breadth of his substitute, however, Congressman Poff made an additional statement upon which the Court in *Simpson* chiefly relied (435 U.S. at 13-14), and which is again strongly urged by petitioners here. After noting that his amendment did not pertain to state offenses, Congressman Poff added (*id.* at 22232);

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.

No response or other comment was directed at this remark, and the debate reverted immediately to the issue of excluding state crimes.

Whatever insight this passage might provide into the congressional intent concerning the issue pre-

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a firearm *to commit any felony which may be committed.* If during the commission of *any felony* wherein such firearm is used the party may be prosecuted in any court of the United States? Does the gentleman contemplate the second criminal proceeding or can this man be tried in the original proceeding where he was first tried?

MR. POFF: * * *

The answer to his question is in the affirmative; namely, it would be expected that the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow.

sented in *Simpson*, it does not serve to answer the question raised here. We do not believe that Congressman Poff's statement was addressed to the question (which was not raised in the debates) whether Section 924(c) could be invoked in lieu of the enhancement provisions in existing law for using dangerous weapons. It is one thing to conclude on the basis of this statement, as the Court did in *Simpson*, that Congress did not intend to permit the double enhancement of sentences where a defendant is charged and convicted under both Section 924(c) and the aggravated offense provision of Sections 111 or 2113; it is an entirely different proposition, however, to determine that Congress meant to preclude the government from prosecuting, and the court from sentencing, under the penalty provisions of Section 924(c) at all.

Moreover, viewing Congressman Poff's statements in their entirety, the legislative history of Section 924(c) fails to offer any suggestion that Congress did not intend to apply the stringent penalty provisions of that statute to defendants who used firearms to commit even those federal felonies that had their own enhanced penalty for using a dangerous weapon. Indeed, one of the principal purposes of the Poff amendment was to increase the deterrent to the use of firearms in federal felonies.[14] In explaining the

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[14] As stated by Congressman Horton (114 Cong. Rec. 22247 (1968)):

> When a person commits a crime with a firearm, he uses his weapon to terrorize his victim with the threat

minimum mandatory sentence provision in his proposal, Congressman Poff stated (114 Cong. Rec. 22231 (1968)):

> The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time.

In a later colloquy with Congressman Cramer, Congressman Poff reiterated that his amendment, unlike the Casey proposal, required mandatory minimum sentences and eliminated concurrent and suspended sentences. *Id.* at 22233. The importance of this aspect of the Poff amendment was emphasized by a number of congressmen during the debates. As Congressman Railsback remarked (*id.* at 22243):

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that, with the flick of his finger, he can snuff out one or more innocent lives. Even where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range. The "equalizer," as it has been called, is a tool of terror, death, and injury in the hands of a criminal. He who stoops to point its barrel at an innocent victim, for money, for revenge, for "kicks," or for any other purpose, deserves to be singled out by the laws as the worst kind of social menace.

Mr. Chairman, I believe that [the Poff] amendment, which adds more severity to the punishment of such offenders, is a legislative necessity.

> Mr. Chairman, one of the major differences between the Casey amendment and the substitute amendment offered by the gentleman from Virginia [MR. POFF], is that in the one case the sentence cannot, specifically cannot be suspended, nor can probation be granted. And that is why many of us feel that the Poff amendment is superior in that important respect. Many of us want to support a minimum mandatory penalty which is provided in the Poff substitute, and which is not provided in the Casey amendment.

Congressman Latta offered a similar view, stressing that the Poff amendment would create a significantly greater deterrent than was provided by existing law (*ibid.*; emphasis added):

> I want the criminal to know before he uses a firearm in committing a crime that, when he is convicted, just as sure as the sun rises tomorrow he is going to jail for a certain number of years. *This is the deterrent that I want to see written into this law, and I do not want any discretion by any court because that is the bugaboo in our present system.* He believes that he can beat the rap, and he takes the chance. I want him to know that he cannot beat the rap and that he is going to prison when convicted.[15]

The Poff amendment was adopted by the House in lieu of the Casey proposal (114 Cong. Rec. 22248

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[15] See also, *e.g.*, 114 Cong. Rec. 22234 (1968) (remarks of Cong. Harsha); *id.* at 22237 (remarks of Cong. Rogers); *id.* at 22243 (remarks of Cong. Wyman); *id.* at 22247-22248 (remarks of Cong. Horton).

(1968)), and the Gun Control Act, including the Poff amendment, passed the House by a vote of 412 to 11 (*id.* at 23094). Following the passage of a different bill by the Senate, the Conference Committee accepted in large measure the House version of Section 924(c). However, the Conference deleted altogether the prohibition on concurrent sentences and made the provision eliminating probation and suspended sentences applicable only to second and subsequent convictions. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).[16] These modifications in Conference caused great concern in the House, and many congressmen objected to the changes and urged that the Conference Report be rejected. As succinctly summarized by Congressman MacGregor (114 Cong. Rec. 30580 (1968)):

> The conferees * * * have destroyed the effectiveness of the Poff amendment on minimum mandatory sentences.

A similar assessment was offered by Congressman Collier (*id.* at 30584):

[16] The Conference version of Section 924(c) was ultimately accepted by the House (114 Cong. Rec. 30587 (1968)) and the Senate (*id.* at 30183), and the bill was signed by the President on October 22, 1968.

Title II of the Omnibus Crime Control Act of 1970 (Pub. L. No. 91-644, 84 Stat. 1889) amended Section 924(c) by reinstating the restriction that no sentence of imprisonment thereunder could be served concurrently with any term imposed for the underlying felony. The amendment also reduced the minimum mandatory sentence of imprisonment for repeat offenders from five to two years. See *Simpson* v. *United States*, *supra*, 435 U.S. at 14 n.9.

> Mr. Speaker, I am deeply disturbed and disappointed that the conferees have seen fit to gut one of the most important provisions of the bill which passed the House on the Gun Control Act of 1968. * * * I believe that removal of the mandatory sentence for commission of a crime or felony while in possession of a firearm eliminates an important aspect of the deterring features of the bill. I regret that the conference report also provides for the mandatory sentence for second offenders to run concurrent with that of penalties for other convictions.[17]

Among the most vigorous opponents of the Conference Report was Congressman Poff himself, notwithstanding that the Conference had adopted much of the amendment he had introduced (114 Cong. Rec. 30583 (1968); emphasis added):

> MR. POFF. * * *
>
> If the real purpose of gun control legislation is to control crime, then the central control mechanism of this bill has been fractured. As the bill passed the House, the central crime control mechanism was the mandatory jail sentence amendment. * * *
>
> * * * * *
>
> * * * [My amendment] was designed to persuade the man who has decided to set forth on a criminal venture to leave his gun at home. It

[17] See also, *e.g.*, 114 Cong. Rec. 30579 (1968) (remarks of Cong. Cramer); *id.* at 30581 (remarks of Cong. MacGregor); *id.* at 30581-30582 (remarks of Cong. Hunt); *id.* at 30582 (remarks of Cong. Watson); *id.* at 30584 (remarks of Cong. Hansen); *id.* at 30585 (remarks of Cong. Hall); *ibid.* (remarks of Cong. Skubitz); *id.* at 30586 (remarks of Cong. Saylor).

is not the severity of punishment that deters. It is the certainty of punishment that deters.

In the posture which the conference report leaves it, the amendment will not promote certainty of punishment. Rather, with respect to the first offense, *actual time in jail will be no more certain than it is today.* The criminal who is tempted to use a gun in the commission of his crime can still do so with the full knowledge that he has at least a 50-50 chance, even after being caught, convicted and sentenced, of never serving a day in jail. And even if it is his second offense, he knows that any jail term he may be required to serve may run concurrently with the same term that can be imposed under present law for the base felony.

With such odds, why should he refrain from using a gun?

Because the Conference had thus weakened the sentencing provisions of his amendment, Congressman Poff voted against the Conference Report. Given his strong views on the need for certainty of punishment to deter armed felons, it is impossible to conclude that Congressman Poff intended that defendants who use firearms to commit a bank robbery or an assault on a federal officer would be punished entirely outside the strict penalty scheme of Section 924(c) and would instead be sentenced under Section 2113 or Section 111 without any limitation on the minimum term of imprisonment, the possibility of probation or a suspended sentence, or the availability of a concurrent sentence. Rather, it was the very inadequacy of existing law that led Congressman Poff to introduce his amendment and ultimately to oppose the Conference Report.

In sum, the legislative history shows that Section 924(c) was enacted precisely because existing law was considered inadequate to deter and punish firearm offenses, and there is no indication whatever that either the Congress as a whole or Congressman Poff intended the penalties specified in Section 924(c) to be inapplicable where the predicate felony contains its own enhancement provision for use of a dangerous weapon.[18]

D. The Decision In *Simpson* v. *United States* Is Not Dispositive Of The Issue Presented In This Case.

In light of the language and legislative history of Section 924(c), we have argued above that the court of appeals correctly held that on remand petitioner

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[18] The Court in *Simpson* also relied (435 U.S. at 14) on the Conference Committee's rejection of the Senate version of Section 924(c) in favor of the modified Poff amendment. The Senate had adopted a floor amendment introduced by Senator Dominick that was limited to the use of firearms in certain specified federal offenses (including Sections 111 and 2113) and that authorized substantial penalties in addition to those provided for the underlying felony even where the sentence imposed for that predicate felony was already enhanced. See 114 Cong. Rec. 27142-27144 (1968). In our view, this action by the Conference can best be understood as an indication of congressional intent that Section 924(c) be broadly applicable to all federal felonies rather than being limited to only certain predicate offenses. In any event, while the Court in *Simpson* construed the Conference's rejection of the Dominick amendment to support its holding that Congress did not intend to authorize cumulative sentences under *both* Section 924(c) and the aggravated predicate felony, nothing in the Conference action on the Dominick amendment suggests that Congress meant to render the stiff penalty provisions of Section 924(c) completely inapplicable whenever the underlying felony provided an enhanced punishment for using a dangerous weapon.

LaRocca could be sentenced under Section 924(c)(1). However, petitioners argue that a contrary conclusion is dictated by this Court's decision in *Simpson* v. *United States*, 435 U.S. 6 (1978), which they read to hold that a defendant may not be sentenced under Section 924(c) whenever the statute defining the predicate offense provides an enhanced punishment for using a dangerous weapon. In our view, this is far too broad a reading of *Simpson*.

The actual holding in *Simpson* was quite narrow. The Court framed the question in *Simpson* to be "whether §§ 2113(d) and 924(c) should be construed as intended by Congress to authorize, in the case of a bank robbery committed with firearms, not only the imposition of the increased penalty under § 2113(d), but also the imposition of an *additional consecutive penalty* under § 924(c)" (435 U.S. at 8; emphasis added). Concluding that Congress had not intended "the additional sentence authorized by § 924(c) to be *pyramided upon a sentence already enhanced* under § 2113(d)" (435 U.S. at 14; emphasis added), the Court held "that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under *both* § 2113(d) and § 924(c)" (435 U.S. at 16; emphasis added). Significantly, the Court did not direct that the sentence under Section 924(c) be vacated, as petitioners now contend is required by *Simpson*, but rather only "reversed and remanded to the Court of Appeals for proceedings consistent with

this opinion" (435 U.S. at 16).[19] Thus, properly read, the decision in *Simpson* holds only that a defendant may not be subjected to cumulative sentences under Section 2113(d) and Section 924(c) for using a firearm in the commission of a bank robbery; however, as the Third Circuit concluded in the instant case (App. 59), *Simpson* does not address the distinct question whether a defendant may be sentenced, in the discretion of the government, either under Section 924(c)(1) or under the enhanced predicate felony, provided that sentence is not imposed under both.[20]

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[19] Petitioner LaRocca emphasizes (78-6029 Br. 9-10, App. 1a-2a) that on remand the court of appeals in *Simpson* vacated the sentence under Section 924(c). Although petitioners in *Simpson* had expressly asked this Court to vacate the Section 924(c) judgments (76-5761 and 76-5796 Br. 8), the Court did not order any specific relief but simply "reversed and remanded to the Court of Appeals for proceedings consistent with this opinion" (435 U.S. at 16). Moreover, since the more severe sentences in *Simpson* were imposed on the Section 2113 counts rather than on the Section 924(c) counts (435 U.S. at 9), the court of appeals' decision on remand in that case is, as a practical matter, the same as the decision of the courts of appeals in this case to allow the government to elect to proceed under either Section 924(c) or the enhancement provision of the predicate felony.

[20] In addition to the Third Circuit, the Ninth Circuit has held that *Simpson* does not preclude the government from proceeding under either Section 2113(d) or Section 924(c). See *United States* v. *Brown*, 602 F.2d 909 (9th Cir. 1979). The Fifth Circuit is divided on the issue. Compare *United States* v. *Shillingford*, 586 F.2d 372, 375-376 & n.7 (5th Cir. 1978), with *United States* v. *Roach*, 590 F.2d 181, 184 (5th Cir. 1979); *United States* v. *Stewart*, 585 F.2d 799, 800 (5th Cir. 1978), cert. denied, No. 78-6007 (Apr. 30, 1979); *United States* v. *Stewart*, 579 F.2d 356, 358 (5th Cir.), cert. denied,

As we have already discussed (pages 24-37, *supra*), the legislative history relied on by the Court in *Simpson* does not aid petitioners here. It seems clear that the Congress, and especially Congressman Poff, never intended to exempt from the stringent penalties of Section 924(c) those defendants who, like petitioner LaRocca, used a firearm in the commission of one of the federal felonies containing an enhancement provision. Furthermore, as noted above (pages 19-24, *supra*), the sentencing scheme of Section 924(c) is fundamentally different from the enhancement provisions of Sections 111 and 2113, and a decision that Section 924(c) does not apply when the

439 U.S. 936 (1978); and *United States* v. *Nelson*, 574 F.2d 277, 280-281 (5th Cir.), cert. denied, 439 U.S. 956 (1978). However, the court in *Nelson* construed *Simpson* to have vacated the sentence under Section 924(c); as discussed in the text above, this reading of the *Simpson* holding is incorrect. The Second Circuit, relying in part on *Nelson*, has interpreted *Simpson* to bar a sentence under Section 924(c)(1) where the underlying felony provision is Section 2113. See *Grimes* v. *United States*, 607 F.2d 6, 17 (2d Cir. 1979). The Fourth Circuit has also stated, in a case in which the sentence was more severe under Section 2113(d) that under Section 924(c), that *Simpson* requires the Section 924(c) sentence to be vacated. *United States* v. *Vaughan*, 598 F.2d 336, 337 (4th Cir. 1979). The District of Columbia Circuit has observed in dicta that *Simpson* prevents the government from using a firearms-related provision as both the predicate felony for Section 924(c) and the basis for a separate conviction. See *United States* v. *Dorsey*, 591 F.2d 922, 941 (D.C. Cir. 1978). And, in a case decided prior to *Simpson*, the Eighth Circuit had held that an offense that had its own enhancement provision for use of a firearm could not serve as the predicate felony for Section 924(c)(1). *United States* v. *Eagle*, 539 F.2d 1166, 1171-1172 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977).

predicate offense has its own enhanced penalty would create irrational results and frustrate the deterrence objectives of the Gun Control Act.

Nor do the maxims of statutory construction invoked in *Simpson* support petitioners. Unlike *Simpson*, petitioner LaRocca cannot on remand be given cumulative sentences under Section 924(c) and the aggravated predicate felony. Thus, this is not a case "in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing * * * [which] raise[s] the prospect of double jeopardy" (435 U.S. at 11), and there is no need to construe Section 924(c) to avoid constitutional issues. In addition, "the maxim that statutes should be construed to avoid constitutional questions offers no assistance here" because, as discussed above, the construction of Section 924(c) urged by petitioners is not "'fairly possible.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7-8, quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977).

Moreover, the rule that ambiguity in a criminal statute should be resolved in favor of lenity, which was applied in *Simpson* to prevent the Section 924(c) sentence from being "pyramided upon a sentence already enhanced under § 2113(d)" (435 U.S. at 14), is not applicable here. The rule of lenity does not come into play unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) such that even "[a]fter [a court has]

'seiz[ed] everything from which aid can be derived' * * * [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Given the language and legislative history of Section 924(c), "there is no ambiguity to resolve. * * * Where, as here, 'Congress has conveyed its purpose clearly, * * * we decline to manufacture ambiguity where none exists.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7, quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). See also, *e.g.*, *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 10; *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *Barrett* v. *United States*, 423 U.S. 212, 217-218 (1976). While "[a] criminal statute, to be sure, is to be strictly construed, * * * it is 'not to be construed so strictly as to defeat the obvious intention of the legislature'". *Barrett* v. *United States*, *supra*, 423 U.S. at 218, quoting *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829).[21] And the fact that Section 924(c) "provides different penalties for essentially the same conduct [as the enhancement

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[21] The propriety of applying the rule of lenity in the face of indications that Congress wished to deal severely with persons committing particular offenses is especially questionable in cases involving the use of firearms. As in *Gore* v. *United States*, 357 U.S. 386 (1958), which rejected the rule of lenity in considering punishment for narcotics offenses (*id.* at 391), the history of Section 924(c) "reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution, and punishment—tighter" (*id.* at 390).

provisions of the predicate felonies] is no justification for taking liberties with" the clear language and intent of Congress. *United States* v. *Batchelder*, *supra*, slip op. 7, citing *Barrett* v. *United States*, *supra*, 423 U.S. at 217. See also *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941).

In *Simpson* the Court also referred to the "principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later" (435 U.S. at 15). As discussed above (pages 21, 24-37 & note 7, *supra*), given Congress' thorough and recent consideration of the firearms problem in the Gun Control Act of 1968, we submit that Section 924(c) rather than Sections 111 or 2113(d) should be read as the more specific provision.[22] In any event, this principle was applied in *Simpson* only as "a corollary of the rule of lenity" (435 U.S. at 15); as we have just discussed, the rule of lenity has no bearing here.

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[22] Contrary to the assertion of petitioner LaRocca (78-6029 Br. 19), the government does not contend that "Section 924(c) would govern *to the exclusion of* Sections 2113(d) and 111 * * *" (emphasis in original). Quite often, as here, more than one federal statute covers the same criminal conduct, and it is our position in the present case that Congress has afforded the government the choice, in the exercise of its prosecutorial discretion, to proceed either under Section 924(c) or under the enhancement provision of the predicate felony. See pages 46-47, *infra*. We agree with petitioner LaRocca (78-6029 Br. 19 n.19) that Section 924(c) did not impliedly repeal the enhancement provisions of Sections 111 or 2113.

Moreover, we doubt that the canon of construction that gives precedence to the more specific statute is applicable to the provisions at issue in this case. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, *the two should be harmonized if possible;* but *if there is any conflict*, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling." 2A C. Sands, *Statutes and Statutory Construction* § 51.05, at 315 (1973) (footnotes omitted; emphasis added), cited in *Simpson*, *supra*, 435 U.S. at 15. Here, there is no "conflict" between Section 924(c) and the enhancement provision of Section 111. In contrast to *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973), cited in *Simpson*, *supra*, 435 U.S. at 15,[23] Sections 924(c) and 111 can co-exist in the same area, and the government's invocation of one rather than the other would not "wholly frustrate explicit congressional intent" or "evade [a statutory] requirement by the simple expedient of [defendants'] putting a different label on their pleadings." *Preiser* v. *Rodriguez*, *supra*, 411 U.S. at 489-490. Indeed, it is not at all uncommon for two federal statutes, with different penalty provisions, to apply

[23] In *Preiser* v. *Rodriguez*, the Court held that a state prisoner who challenges the fact or duration of his confinement and seeks to be released from custody must proceed under the habeas corpus statute and cannot sue under 42 U.S.C. 1983.

to the same criminal conduct. See, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7, 9; *United States* v. *Gilliland*, *supra*, 312 U.S. at 95; *United States* v. *Jones*, 607 F.2d 269, 271-273 (9th Cir. 1979); *United States* v. *Hamel*, 551 F.2d 107, 113 (6th Cir. 1977); *United States* v. *Gordon*, 548 F.2d 743, 744-745 (8th Cir. 1977); *United States* v. *Melvin*, 544 F.2d 767, 775-777 (5th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Radetsky*, 535 F.2d 556, 568 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Brewer*, 528 F.2d 492, 498 (4th Cir. 1975); *United States* v. *Carter*, 526 F.2d 1276, 1278 (5th Cir. 1976); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Librach*, 520 F.2d 550, 556 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (2d Cir. 1968). See also *United States* v. *Bishop*, 412 U.S. 346, 355-356 (1973); *Sansone* v. *United States*, 380 U.S. 343, 352-353 (1965); *Berra* v. *United States*, 351 U.S. 131, 134 (1956).[24]

[24] Petitioner LaRocca, relying on the variety of provisions prohibiting the use of a dangerous weapon to commit specific federal felonies, contends (78-6029 Br. 19-21) that "Congress has carefully graded the potential penalties for the use of a weapon in violation of these provisions according to the nature of the crime and the threat posed to the interests of the United States" (footnote omitted). In our view, however, such a diversity of provisions does not evidence a deliberate congressional effort to calibrate, on a precise and comparative basis, the exclusive penalties for using a dangerous weapon in the commision of a federal felony. As discussed in the text, a general and a more specific federal statute often provide dif-

In this case, as in *Batchelder*, the proper resolution to "harmonize" the statutes is to interpret Section 924(c) as an alternative to the enhancement provisions of Section 111 and the other similar laws dealing with the use of dangerous weapons in the commission of particular crimes. Such an interpretation reflects the settled rule that, when two statutes are applicable to the same criminal conduct, the prosecutor has discretion to select the proper charge. As the Court stated in *Batchelder*, *supra*, slip op. 9, 10-11 (citations omitted):

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. * * * Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.
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> * * * * *
>
> * * * [T]here is no appreciable difference between the discretion a prosecutor exercises when

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fering penalties for the same criminal conduct without either statute preempting the other. We submit that Congress, in enacting Section 924(c), intended to allow federal prosecutors the flexibility in each case to bring an appropriate charge under either Section 924(c) or the enhancement provision of the predicate felony (see pages 46-47, *infra*). Moreover, there is no reason to believe that Congress, having specifically studied the firearm problem in passing the Gun Control Act of 1968, intended to treat more leniently criminals who used firearms to assault a federal officer or rob a bank than those who used such weapons to commit myriad other federal offenses (see pages 21, 43 & n.7, *supra*).

> deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone does not give rise to a violation of the Equal Protection or Due Process Clauses. * * * Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.

See also *United States* v. *Brown*, 602 F.2d 909, 912 (9th Cir. 1979).[25]

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[25] Petitioner LaRocca hypothesizes (78-6029 Br. 21 n.21) that "the government's theory would create anomalies that Congress could not have intended between the penalties available to punish the use of a firearm and those available to punish the use of another type of dangerous weapon." As discussed above (pages 21-24, *supra*), however, the position advanced by petitioners entails a series of illogical results that seriously undermine their argument. In any event, the hypothetical difficulties posed by petitioner LaRocca can be resolved, as in a great many other areas of the law, through the exercise of sound prosecutorial discretion to bring an appropriate charge in each case either under Section 924(c) or under the enhancement provision of the predicate felony.

II. A DEFENDANT MAY BE CONSECUTIVELY SENTENCED FOR AIDING AND ABETTING AN ASSAULT WITH A FIREARM UPON A FEDERAL OFFICER, IN VIOLATION OF 18 U.S.C. 2 AND 111, AND FOR CARRYING A SECOND FIREARM DURING THE COMMISSION OF THAT ASSAULT, IN VIOLATION OF 18 U.S.C. 924(c)(2)

Petitioner Busic was charged (Counts 6 and 7) with aiding and abetting petitioner LaRocca in assaulting federal officers by means of a firearm, in violation of 18 U.S.C. 2 and 111;[26] on these counts

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[26] In addition to being present and armed during LaRocca's attack on the federal agents, Busic also appears to have originally purchased the pistol used by LaRocca (App. 29).

The district court's principal instructions to the jury on the charges against Busic of aiding and abetting LaRocca's assault were as follows:

> The Government contends, of course, as I understand it, that Busic was aware of the plan to rob Harvey and that he was there to assist LaRocca in all of the activities there and the fact that he did not fire merely indicates that he thought it better not to do so.
>
> As I have explained, one who aids and abets another to commit an offense is as guilty of the offense as if he had committed it himself. Accordingly, you may find Busic guilty of the offenses of assault upon federal officers if you find beyond a reasonable doubt that he was LaRocca's aider and abettor or counselor when they went to the shopping center. The question is did he associate himself with the venture, did he plan to help it succeed. This is, of course, for you to decide. If he had actually gone to the center to end the matter and if he did not aid and abet LaRocca, he would, of course, not be guilty of the assaults on the federal officers. [Tr. 604]
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> * * * * *
>
> THE COURT: Let the record show we are in open court. I have received a question from the jury which reads as follows: "Count Six. Even though Mr. Busic did not actively participate in the assault did his participation in the conspiracy make him guilty of the assault."
>
> Ladies and gentlemen, the answer to your question is yes unless you find that Busic withdrew from the conspiracy before the assault began or unless you find that as he claimed he went there merely for the purpose of telling Harvey that the deals were off. If he had withdrawn from the conspiracy before the assault began, he would not be guilty of the assault as an aider and abettor. If he was still a part of the conspiracy and intended to aid and abet LaRocca in the robbery in the event you find that the purpose in going to the shopping center was the robbery, then he would be guilty of the assault. This issue, of course, requires that you determine his mental state, that is, what he intended. [Tr. 629-631]

Busic received a sentence of five years' imprisonment (two years of which were perforce under the enhancement provision of Section 111). Busic was also charged (Count 18) with unlawfully carrying a second firearm during the commission of a federal felony, in violation of 18 U.S.C. 924(c)(2). On this count Busic was sentenced to a consecutive term of 20 years' imprisonment.

The district court denied Busic's post-trial motion for judgment of acquittal as to Counts 6 and 7 on the ground that LaRocca's armed assault on the federal officers was in furtherance of the original narcotics conspiracy and that therefore, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), Busic was liable for LaRocca's acts (App. 30-32). The court of appeals affirmed, finding that "the evidence overwhelmingly supports his conviction under both a conspiracy and an aiding and abetting theory. See *Nye & Nis[sen]* v. *United States*, 336 U.S. 613 (1949); *Pinkerton* v. *United States*, 328 U.S. 640 (1946)." (App. 53 n.12). Busic does not in this Court challenge his convictions for aiding and abetting.

Busic asserts as his "princip[al] contention" that Section 924(c)(2), which prohibits the unlawful carrying of a firearm during the commission of a federal felony, "does not apply where the underlying offense already contains a sentencing enhancement provision for use of a firearm" (78-6020 Br. 8). As we have shown above in Part I, however, Section 924(c) is fully applicable even though the predicate felony contains its own enhancement provision, so long as the defendant is not doubly punished for the same firearm element. Moreover, even if Section 924(c)(1) were inapplicable to such a felony, so that a defendant (like LaRocca) who *uses* a firearm to assault a federal officer could be punished only under Section 111, we submit that a defendant (like Busic) who unlawfully carries (but does not use) a firearm during the commission of that felony can properly be sentenced under Section 924(c)(2). The federal enhancement statutes (including Sections 111 and 2113) proscribe only the use of a dangerous weapon to commit the offense, and they contain no provision punishing the unlawful carrying of such a weapon. Thus, if Section 924(c)(2) were inapplicable, a defendant who unlawfully carries a firearm would receive no enhanced sentence and would be subject only to the same penalty as one who commits the offense without carrying a firearm—a result directly contrary to the language and legislative history of Section 924(c)(2), which unmistakably demonstrate that Congress intended to punish as a separate offense the

unlawful carrying of a firearm in the commission of a federal felony. See note 8, *supra*.

Busic also contends that this Court's decision in *Simpson* v. *United States*, *supra*, precludes the imposition of an additional penalty under Section 924(c)(2) for unlawfully carrying a firearm during the commission of an assault for which he received an enhanced sentence under Section 111.

If we are correct in the preceding argument (pages 17-47, *supra*) that a defendant may be sentenced either under Section 924(c) or under the enhancement provision of Section 111, then it is unnecessary for the Court to consider whether Busic was properly sentenced under both statutes. Since Busic's five-year sentence under Section 111 is concurrent with seven other five-year terms of imprisonment that are unchallenged, only his sentence under Section 924(c)(2) will actually affect his incarceration. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); compare *Benton* v. *Maryland*, 395 U.S. 784 (1969).[27]

In any event, in the circumstances of this case, petitioner Busic's consecutive sentences under Section 924(c)(2) and the enhancement provision of Section 111 were fully proper. Unlike the situation in *Simpson*, where the government was "able to prove violations of two separate criminal statutes with pre-

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[27] We also note that, even if Busic were correct that consecutive sentences are barred for the aggravated assault and the firearm offense, this would at most affect his Section 111 sentence and would leave intact the Section 924(c) sentence.

cisely the same factual showing" (435 U.S. at 11) and "relied on the same proofs to support the convictions under both statutes" (435 U.S. at 12), Busic's two convictions did not rest on identical evidence. Two separate firearms were involved in petitioners' shootout with federal officers. One firearm was used by petitioner LaRocca to assault BATF agents Alfree and Petraitis and DEA agent Macready. For his part in aiding and abetting LaRocca, Busic was sentenced to five years' imprisonment under 18 U.S.C. 2 and 111; the enhancement provisions of Section 111 were applicable because LaRocca had used a firearm and thus committed an aggravated assault. The second firearm was unlawfully carried (but not used) by Busic (a previously convicted felon) during LaRocca's armed assault; for this distinct offense, Busic received a consecutive sentence of 20 years' imprisonment under Section 924(c)(2) for unlawfully carrying a firearm during the commission of a federal felony. Since each of his convictions was based on a different firearm that was used or carried by a different person, Busic was properly sentenced to consecutive terms under Section 924(c)(2) and the enhancement provision of Section 111.[28]

[28] This is not a case that presents a question concerning "[w]hat Congress has made the allowable unit of prosecution." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). See, *e.g.*, *Ladner* v. *United States*, 358 U.S. 169 (1958) (Congress did not intend that injuring two federal officers with one shot be punished as two separate offenses); *Gore* v. *United States*, 357 U.S. 386 (1958) (consecutive sentences allowable for multiple offenses arising out of a single narcotics transaction); *Bell* v. *United States*, 349 U.S. 81 (1955) (Congress did not intend that illegally carrying two women across state lines in one vehicle be punished as two separate crimes); *Blockburger* v. *United States*, 284 U.S. 299 (1932) (consecutive prison terms permissible for two crimes committed by a single sale of narcotics); *Ebeling* v. *Morgan*, 237 U.S. 625 (1915) (consecutive sentences upheld for cutting several mail bags in one transaction). See also *Sanabria* v. *United States*, 437 U.S. 54, 70 n.24 (1978). Such a question would be presented, for example, if a single defendant who used two firearms to assault a federal officer, or who fired two bullets from one gun at a federal officer, were prosecuted for two violations of the same statute. In this case, however, Busic was guilty both of aiding and abetting LaRocca's armed assault and of carrying his own firearm; these clearly presented distinct risks to the public good and constituted separate violations of different statutes.

Similarly, this is also not an appropriate case to consider whether *Simpson* would ever bar the government from proceeding under Section 924(c)(2) and the enhancement provision of Section 111. That issue would be posed, for instance, if a defendant who unlawfully carried and used a single firearm to assault a federal officer were prosecuted under Section 924(c)(2) for carrying the weapon and under the enhancement provision of Section 111 (but not under Section 924(c)(1)) for using the same firearm to commit the assault.

Nor, for the same reasons, do Busic's consecutive sentences under Section 924(c)(2) and the enhancement provision of Section 111 violate the Double Jeopardy Clause. For present purposes we may assume that the Double Jeopardy Clause forbids the imposition of cumulative penalties for convictions at a single trial of two crimes, one of which is a lesser

included offense of the other.[29] The usual standard for determining whether offenses are sufficiently distinct to permit cumulative punishment was set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). See also *Harris* v. *United States*, 359 U.S. 19 (1959).

The *Blockburger* test is plainly satisfied in this case.[30] The offense of aiding and abetting an aggravated assault, in violation of 18 U.S.C. 2 and the

[29] It is our position, however, as we argue in our brief in *Whalen* v. *United States*, No. 78-5471, that the legislature may constitutionally authorize consecutive punishments even where the two statutory violations are not sufficiently distinguishable to constitute separate offenses under the *Blockburger* test. Since the *Blockburger* test is plainly satisfied in the instant case, the *Whalen* argument need not be pursued here.

[30] Indeed, the present case is not at all the type of situation that *Blockburger* was designed to address, since it is clear that Busic received consecutive sentences for two distinct acts rather than for "the same act." Such a case indisputably does not violate the Double Jeopardy Clause.

enhancement provision of 18 U.S.C. 111, requires proof, *inter alia*, that a dangerous weapon was in fact used to assault a federal officer and that the defendant aided and abetted that assault; for this offense, it is not necessary to prove that a firearm (rather than some other dangerous weapon, such as a knife) was used, that the defendant either carried or used the dangerous weapon, or that, if the defendant did carry the weapon, it was unlawful for him to do so. In contrast, a conviction under Section 924(c)(2) requires, *inter alia*, a showing that any federal felony (not necessarily assault on a federal officer) was committed, that the defendant actually carried a firearm (not any other type of dangerous weapon) during the commission of that felony, and that it was unlawful, under applicable federal, state or local law, for the defendant to carry the firearm.[31]

[31] The act of carrying the firearm must be independently unlawful under applicable federal, state or local law; unlawfulness based simply upon the fact that the firearm was carried in furtherance of the underlying felony is insufficient. See, *e.g.*, *United States* v. *Risi*, 603 F.2d 1193 (5th Cir. 1979); *United States* v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1978); *United States* v. *Garcia*, 555 F.2d 708 (9th Cir. 1977); *United States* v. *Akers*, 542 F.2d 770 (9th Cir. 1976), cert. denied, 430 U.S. 908 (1977); *United States* v. *Crew*, 538 F.2d 575 (4th Cir.), cert. denied, 429 U.S. 852 (1976); *Perkins* v. *United States*, 526 F.2d 688 (5th Cir. 1976); *United States* v. *Howard*, 504 F.2d 1281 (8th Cir. 1974); *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973); *United States* v. *Sudduth*, 457 F.2d 1198 (10th Cir. 1972). During the House debates on the Casey amendment, several congressmen expressed concern that the proposal, as originally introduced, might impose stiff penalties upon police-

Thus, it is evident that the elements of the offenses are sufficiently distinct to meet the *Blockburger* test. See *Wayne County Prosecutor* v. *Recorder's Court Judge*, 280 N.W.2d 793 (Mich. 1979), appeal dismissed for want of a substantial federal question *sub nom. Brintley* v. *Michigan*, No. 79-5506 (Nov. 13, 1979); *West* v. *United States*, No. 78-5252 (6th Cir. Nov. 14, 1979), slip op. 3-4; *Kowalski* v. *Parratt*, 533 F.2d 1071 (8th Cir.), cert. denied, 429 U.S. 844 (1969).

Furthermore, because two separate guns were involved in this case, the prosecution was required to prove, and the jury was required to find, independent facts as to each offense. As the Court noted in *Brown* v. *Ohio*, *supra*, 432 U.S. at 167 n.6, strict application of the *Blockburger* test would permit imposition of consecutive sentences in these circumstances because separate convictions for aiding and abetting an assault with one firearm and for unlawfully carrying a second firearm require proof in each count that a different firearm was involved. See also *Ebeling* v. *Morgan*, *supra*, 237 U.S. at 631. Hence, under this analysis as well, it is again apparent that Busic's consecutive sentences pursuant to Sections 924(c)(2) and 111 are not barred by the Double Jeopardy Clause.

men or other licensed gun carriers who were later found to have committed federal felonies while lawfully carrying their firearms. See, *e.g.*, 114 Cong. Rec. 21788-21789, 21792, 22231 (1968). In order to avoid this result, the Poff amendment included the requirement that the firearms be carried "unlawfully" (*id.* at 22231), and the House rejected an amendment that would have deleted the word "unlawfully" from the Poff proposal (*id.* at 22236, 22237, 22245).

III. IN THE EVENT THE COURT VACATES PETITIONERS SECTION 924(c) SENTENCE, THE APPROPRIATE DISPOSITION OF THE CASE WOULD BE TO REMAND TO THE DISTRICT COURT FOR RE-SENTENCING ON THE SECTION 111 COUNTS

In the event the Court disagrees with our principal contention that petitioners were properly sentenced under Section 924(c), the question remains what disposition of the case would be "just under the circumstances" (28 U.S.C. 2106). We submit that the appropriate course in this case would be to vacate petitioners' sentence on the Section 111 counts and to remand for re-sentencing on those counts, subject to (1) the maximum statutory penalty authorized by Section 111, and (2) the limitation that the new sentence cannot exceed that previously imposed for the armed assault offenses under Sections 924(c) and 111.[32]

Petitioners Busic and LaRocca were respectively found guilty in this case on 16 and 14 felony counts, including, as relevant here, two armed assaults on federal officers. Prior to this Court's decision in *Simpson* v. *United States*, *supra*,[33] petitioners were

[32] The disposition we suggest would be equally applicable if the Court holds that petitioner Busic's sentence under Sections 924(c) and 111 was inconsistent with *Simpson* v. *United States*, *supra*, or violated the Double Jeopardy Clause.

[33] Petitioners were sentenced on March 11, 1977 (App. 17-20), almost a year before this Court's decison in *Simpson* v. *United States*, *supra*.

each sentenced for their armed assaults to 25 years' imprisonment (five years of which were made concurrent with other terms of imprisonment not at issue here).[34] If they prevail in this Court and have their sentence under Section 924(c) vacated, petitioners will be subject to only a five-year term of imprisonment for the armed assault offenses.

Such an unanticipated and undeserved windfall to petitioners should not be countenanced. Whether their criminal conduct is denominated as a violation of Section 924(c), or of Section 111, or both, petitioners engaged in criminal activities calling for severe condemnation and punishment. The district court im-

[34] Petitioners were sentenced to a term of five years' imprisonment under Section 111 (Counts 6 and 7) and to a consecutive term of 20 years' imprisonment under Section 924(c) (Count 18 for petitioner Busic, and Count 19 for petitioner LaRocca). Petitioners' sentence under Section 111 was concurrent with their sentence of five years' imprisonment for firearms offenses other than Section 924(c). In addition, petitioners were sentenced to a consecutive term of five years' imprisonment for various narcotics offenses. In total, each petitioner received a sentence of 30 years' imprisonment. See page 5, *supra*.

Because the maximum penalty that could be imposed under Section 111 for two counts of armed assault is 20 years' imprisonment (two consecutive 10-year terms), petitioners' re-sentence on remand would in fact be less than the 25 years' imprisonment (five years of which were concurrent with the sentences on other counts) they originally received for the armed assaults under Sections 924(c) and 111. Nevertheless, such a 20-year sentence, if made consecutive to the sentences on the other charges of which petitioners were convicted, would result in a total term of 30 years' imprisonment, the same cumulative sentence that was initially imposed.

posed substantial terms of imprisonment commensurate with the gravity of petitioners' acts, and it is of no practical consequence that petitioners' sentence for the armed assaults was apportioned between the counts under Section 924(c) and those under Section 111. Petitioners now seek to have their armed assault sentence reduced from 25 years' imprisonment to five years' imprisonment because of this Court's intervening decision in *Simpson* v. *United States*, *supra* —a decision that the district court could not have taken into account in structuring petitioners' sentence. It is, we think, inconceivable that the district judge, who elected a total sentence of 25 years for the assaults and chose Section 924(c) as the primary vehicle for that result, would have sentenced petitioners to only five years for their conduct had he known that Section 111 was the sole provision under which the armed assaults could be punished.[35] Indeed, since petitioners' sentence on the Section 111 counts is concurrent with other sentences they received, vacation of the Section 924(c) sentence would mean that petitioners would in effect be subject to no augmented punishment for their armed assaults. In these circumstances, we submit that the appropriate disposition of this case (assuming the Court con-

[35] Since the legal issue petitioners raise concerns purely formal and technical aspects of the sentencing and is wholly unrelated to the choice of a just punishment for their criminal conduct, it seems especially unlikely that the district court would have imposed a sentence of only five years for the armed assaults if it had understood the law to be as petitioners now contend.

cludes that petitioners' Section 924(c) sentence was unauthorized) is to remand to the district court for re-sentencing on the Section 111 counts subject only to (1) the maximum penalties prescribed by Congress in that statute, and (2) the restriction that the new sentence imposed on each petitioner for the armed assault offenses not exceed the original total sentence he received for those offenses.[36]

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[36] *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), is not to the contrary. In *Addonizio*, the Court held that Section 2255 relief was not available to a prisoner who claimed that a change in the policies of the United States Parole Commission had frustrated the sentencing judge's subjective intent concerning the expected term of actual imprisonment. Unlike *Addonizio*, the instant case does not involve the "settled law that * * * narrowly limit[s] the grounds for collateral attack on final judgments" (slip op. 6). Moreover, our contention does not turn on "the subjective intent of the sentencing judge" (slip op. 9) or on the judge's "expectations with respect to the actual release of a sentenced defendant short of his statutory term" (slip op. 11). Rather, our position depends solely on the objective fact that the district judge sentenced petitioners to 25 years' imprisonment for their armed assaults on federal officers—a decision that unquestionably was "his to make" (slip op. 11) and was not committed to any other institution of government.

Of course, the district court on remand is not obligated to impose a sentence equivalent to that originally ordered. If, for example, the initial sentence was influenced by the fact that petitioners violated both Section 924(c) and Section 111, then the re-sentence on the Section 111 counts alone might be appreciably less than the earlier sentence. On the other hand, if, as we believe likely, the initial sentence reflected the district court's view that petitioners' armed assaults on federal officers, in light of their prior criminal records and prospects for rehabilitation, warranted a sentence of 25 years' imprisonment and that the apportionment of this sentence between

We acknowledge the double jeopardy implications of the disposition we propose, but we believe that such concerns cannot withstand analysis.

The Double Jeopardy Clause "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Only the last of these three protections is involved here.

In our view, the course we advocate cannot be said in any meaningful sense to constitute "multiple punishments for the same offense." As the Court held in *Pearce*, *supra*, the Double Jeopardy Clause does not "impose[] an absolute bar to a more severe sentence upon reconviction" (395 U.S. at 723).

> [A]t least since 1919, when *Stroud* v. *United States*, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. * * *

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the two statutes was immaterial, then the re-sentence would, to the extent possible, parallel the earlier punishment. The critical point here is whether anything in the Double Jeopardy Clause precludes a remand to the district court for such re-sentencing, which this Court is statutorily empowered to order under 28 U.S.C. 2106.

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. * * * [If a new trial] does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. [395 U.S. at 720-721; footnotes omitted].

Although petitioners in the instant case have not challenged their conviction or sentence under Section 111, we submit that the Double Jeopardy Clause does not forbid the district court to re-sentence them on the Section 111 counts if their sentence under Section 924(c) is upset at their behest. As in *Pearce*, petitioners initiated the appellate proceedings that give rise to the need for re-sentencing. Cf. *United States* v. *Scott*, 437 U.S. 82, 93, 98-99 (1978). Thus, this is not a case in which the government instituted steps to increase a defendant's punishment on a given count, and there is no "act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, *supra*, 437 U.S. at 91. In addition, the sentences under Section 924(c) and Section 111 derive from the same armed assaults on federal officers. Since petitioners would not on remand be subject to any greater sentence for the armed assaults than the

25 years' imprisonment they initially received (including credit for time already served, see *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-719), they would suffer no enhanced or multiple punishment for those offenses.[37]

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[37] Since, under this analysis, petitioners' sentences would not be increased by re-sentencing, the due process protections against vindictiveness recognized in *North Carolina* v. *Pearce*, *supra*, are inapplicable here. Moreover, "the possibility that a defendant might be deterred [by this result] from the exercise of a legal right [to appeal]" does not violate the Due Process or Double Jeopardy Clauses. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). See also *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 29 (1973); *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 719-721. Indeed, since the appeal could not result in a higher sentence than that originally imposed, there could be no deterrent to an appeal.

For the same reasons, the court of appeals erred in concluding (App. 47) that petitioner LaRocca could not be re-sentenced to a greater punishment on the Section 924(c) count or on the Section 111 counts (whichever the government elects for re-sentencing) than he had initially received for the offense. As discussed in the text, the appropriate standard for measuring the severity of the re-sentence is the composite sentence initially imposed on the armed assault counts under Sections 924(c) and 111. Nor would the disposition we propose "allow the government to do indirectly what * * * it cannot do directly." *United States* v. *Stewart*, 585 F.2d 799, 801 n.5 (5th Cir. 1978), cert. denied, No. 78-6007 (Apr. 30, 1979). Rather, this procedure will enable the district court to impose whatever sentence it would have initially ordered for the armed assault offenses if it had been aware of the legal restrictions on its sentencing power, subject to the limitation that petitioners cannot be given a greater punishment than they originally received.

This Court has also recognized that an unlawful sentence can be corrected without running afoul of the Double Jeopardy Clause even if the revised sentence exceeds the original one. See *Bozza* v. *United States*, 330 U.S. 160 (1947); *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900); see also *Pollard* v. *United States*, 352 U.S. 354 (1957). "To hold otherwise would allow the guilty to escape punishment through a legal accident" (*Pollard* v. *United States*, *supra*, 352 U.S. at 361), for "[i]f this inadvertent error cannot be corrected * * * no valid and enforceable sentence can be imposed at all" (*Bozza* v. *United States*, *supra*, 330 U.S. at 166). Analogously to those cases, petitioners here, if not subject to re-sentencing, would in a very real sense be allowed to escape punishment for the aggravated offense of armed assault. To the extent that the district court, following reversal of the Section 924(c) convictions, cannot bring petitioners' sentence into line with the penalty it originally intended and imposed for the armed assaults, petitioners will be allowed through a legal accident to escape the full and fair measure of their punishment. Indeed, under the existing sentence, petitioners have received concurrent five-year terms of imprisonment on the two Section 111 counts of armed assault, a lesser penalty than could have been imposed for two *unarmed* assaults on federal officers. See also page 59, *supra*.

It is well settled that "[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States* v. *Tateo*,

377 U.S. 463, 466 (1964). See also, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 92 (1978). Inherent in this societal interest is the fundamental recognition that a convicted defendant should receive an appropriate sentence that reflects his character and the nature and severity of his criminal conduct. See, *e.g.*, *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires * * * that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). As *North Carolina* v. *Pearce* and *Bozza* v. *United States* illustrate, the Double Jeopardy Clause does not render nugatory or illegitimate the societal interest in having just sentences meted out to convicted defendants. While the Double Jeopardy Clause was designed "to protect the integrity of a final judgment" (*United States* v. *Scott*, 437 U.S. 82, 92 (1978)) and requires due regard for "principles of fairness and finality" (*United States* v. *Wilson*, 420 U.S. 332, 343 (1975)), it cannot be said that to allow petitioners to be re-sentenced following their successful appeal in this case would forsake these precepts. Likewise, it is at best a semantic exercise to conclude that re-sentencing petitioners to no greater penalty than they originally received for their armed assaults on federal officers would be to subject them "to the possibility of further punishment by being again * * * sentenced for the same offense" (*ibid.*). If petitioners' Section 111 sentences are vacated and the case remanded for re-sentencing, "we cannot say that the constitutional

guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721.

This Court has never considered whether a defendant who succeeds in challenging one of two related sentences can be subject to re-sentencing on the unchallenged count. The lower federal courts have resolved this question against the government.[38] In our view, however, these decisions have simply seized, without further analysis, on the perceived double-jeopardy rule that in no circumstances can a valid sentence on an uncontested conviction be in-

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[38] See *United States* v. *Frady*, 607 F.2d 383 (D.C. Cir. 1979); *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969); *United States* v. *Bynoe*, 562 F.2d 126 (1st Cir. 1977); *United States* v. *Sacco*, 367 F.2d 368 (2d Cir. 1966); *United States* v. *Fredenburgh*, 602 F.2d 1143 (3d Cir. 1979); *United States* v. *Benedetto*, 558 F.2d 171 (3d Cir. 1977); *Government of the Virgin Islands* v. *Henry*, 533 F.2d 876 (3d Cir. 1976); *United States* v. *Corson*, 449 F.2d 544 (3d Cir. 1971) (en banc); *United States* v. *Welty*, 426 F.2d 615 (3d Cir. 1970); *Whaley* v. *North Carolina*, 379 F.2d 221 (4th Cir. 1967); *Chandler* v. *United States*, 468 F.2d 834 (5th Cir. 1972); *United States* v. *Adams*, 362 F.2d 210 (6th Cir. 1966); *United States* v. *Turner*, 518 F.2d 14 (7th Cir. 1975); *United States* v. *Durbin*, 542 F.2d 486 (8th Cir. 1976); *United States* v. *Edick*, 603 F.2d 772 (9th Cir. 1979); *United States* v. *Best*, 571 F.2d 484 (9th Cir. 1978); *Kennedy* v. *United States*, 330 F.2d 26 (9th Cir. 1964); *Owensby* v. *United States*, 385 F.2d 58 (10th Cir. 1967).

creased. As discussed above, however, such a rule is unfounded.[39]

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[39] The Third Circuit has endeavored to support this asserted rule on the theory that "the constitution protects the expectations created in a defendant when he is properly convicted and sentenced [on a given count]." *United States* v. *Fredenburgh*, *supra*, 602 F.2d at 1147-1148. "Perhaps the best explanation for this rule is that a defendant's initial expectations as to the maximum sentence he must serve on a valid judgment of conviction should not be defeated * * *." *Id.* at 1148. It is wholly unrealistic, however, to believe that petitioners' original sentence created an expectation that they would not be imprisoned for more than five years on the Section 111 counts. Rather, petitioners knew that they had received an overall sentence of 30 years' imprisonment in this case and a composite sentence of 25 years' imprisonment (five years of which were concurrent with other terms of incarceration) for the armed assault offenses.

In any event, the Double Jeopardy Clause does not require that considerations other than a defendant's expectations be disregarded. Neither *North Carolina* v. *Pearce* nor *Bozza* v. *United States* turned on the existence or predominance of a defendant's expectations; rather, they represent the careful accommodation of the right of the defendant to fair treatment and the interest of society in the just disposition of criminal cases. Likewise, the Third Circuit's view that the Double Jeopardy Clause vests a defendant with an indefeasible expectation that his sentence on one of a series of related counts will not be changed, regardless of the interests of justice and of society, cannot be squared with the principle derived from *United States* v. *Wilson*, *supra*, that a defendant's expectations arising from an acquittal by the trial court following a jury verdict of guilty are subject to defeasance when the favorable action is premised upon a legal error (see 420 U.S. at 345). In the same way, we suggest that the Double Jeopardy Clause does not make inviolable whatever expectations petitioners might have in this case or entitle petitioners to a windfall reduction in their sentence by barring the district court from re-sentencing them on the Section 111 counts up to the penalty previously imposed for the armed assault offenses under Sections 924(c) and 111.

Moreover, these lower federal court decisions are almost uniformly premised on what we believe is a superficial and incorrect reading of this Court's decision in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). In *Lange*, the trial court sentenced the defendant to imprisonment *and* a fine even though the punishment authorized by statute was imprisonment *or* a fine. After defendant had paid the fine, the trial court sought to correct the sentence by imposing only a term of imprisonment. This Court held that once the defendant had paid the fine (which had gone into the Treasury and therefore could not be refunded), he had satisfied a sentence authorized by statute and thus could not thereafter be re-sentenced without being subjected to impermissible double punishment:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And * * * there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, *supra*, 85 U.S. (18 Wall.) at 168, quoted in *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-718. See also *In re Bradley*, 318 U.S. 50 (1943); *United States* v. *Benz*, 282 U.S. 304, 307 (1931).

The imposition of both a fine and imprisonment in *Ex parte Lange* was a multiple punishment prohibited by the Double Jeopardy Clause precisely be-

cause Congress had not authorized both penalties; it had authorized only one or the other.[40] In our view, *Ex parte Lange* holds that "the role of the * * * [Double Jeopardy Clause] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Such a rule has no bearing on the question whether a defendant who successfully attacks certain counts of his conviction or punishment can be re-sentenced on the remaining counts that grow out of the same criminal conduct as the invalidated counts. Notwithstanding *Ex parte Lange*, we submit that where an unlawful act results in a multi-count prosecution under more than one federal statute, the Double Jeopardy Clause does not bar a defendant from being re-sentenced on the outstanding counts if his conviction or sentence on the other counts is overturned on his appeal, provided that the re-sentence complies with the maximum penalty authorized by statute for each count and does not exceed the aggregate sentence originally imposed for such criminal conduct.

In the instant case, it is clear that petitioners' sentences under Section 924(c) and Section 111 de-

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[40] It is not entirely clear why the Court in *Ex parte Lange* rested its decision on double jeopardy grounds, since the same result was compelled by the statute under which the defendant was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would seem indisputable that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by statute.

rive from the same criminal act—the armed assaults of federal officers. For this criminal conduct, petitioners were each sentenced to consecutive terms of 20 years' imprisonment on the Section 924(c) count and five years' imprisonment on the Section 111 counts. If this Court vacates the Section 924(c) counts, the fact that petitioners' sentences were allotted between two statutes should not, as a matter of constitutional command, entitle petitioners to serve only a five-year term of incarceration on the Section 111 counts. Instead, the case should be remanded to the district court to re-sentence petitioners on the Section 111 counts, subject to the limitation that such re-sentence cannot exceed either the maximum penalty allowed by that statute or the total sentence previously imposed on petitioners under Sections 924(c) and 111 for the armed assault offenses of which they were convicted.[41]

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[41] In our view, there is no procedural impediment to the Court's consideration of this issue even though the government did not file a cross-petition for a writ of certiorari. (We note that the issue was presented in the government's brief in the court of appeals (Brief for Appellee at 19-21, Nos. 77-1375, 77-1376 (3d Cir.)) and in the Brief for the United States as respondent at the petition stage (page 11 n.10).) This issue is incident to the Court's "plenary authority under 28 U.S.C. § 2106 to make such disposition of the case 'as may be just under the circumstances.'" *Haynes* v. *United States*, 390 U.S. 85, 101 (1968). Moreover, we address here only the question of the proper disposition of the case in the event the judgment of the court of appeals is reversed—a matter the Court would be obliged in any event to consider. Since the government was and is satisfied with the court of appeals' judgment, and since the disposition we propose would not grant the government any greater relief than was afforded by the court of appeals, there should be no requirement that a cross-petition be filed. Finally, we note the tremendous burden that would be imposed on the federal government and on this Court if the government were obligated to scrutinize each of the thousands of cases every Term in which it is or might be a respondent to determine whether a cross-petition is necessary to protect, in the event certiorari is granted, the fruits of a lower court judgment with which it is content. See Stern, *When to Cross-Appeal or Cross-Petition —Certainty or Confusion?*, 87 Harv. L. Rev. 763, 775-776 (1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Introduction

Various propositions of fact and law have been discussed at length in the briefs of the petitioners, Busic and LaRocca, and the reply brief of LaRocca. No attempt is made herein to repeat arguments made previously on behalf of either petitioner. However, there are certain observations which must be made about the contentions of the Government relating to petitioner Busic.

I.
SIMPSON V. UNITED STATES, REQUIRES THAT PETITIONER'S CONVICTION AND SENTENCE UNDER COUNT 18 BE VACATED.

The Government correctly points out that the firearm which Busic "carried" was different than the firearm which

LaRocca "used" in his assaults on the Federal agents and that Busic was convicted of aiding and abetting the assaults by LaRocca. Also, Busic was sentenced under the enhanced sentencing provision of 18 U.S.C. § 111.[1]

There should not be any misunderstanding about Busic's position. The fundamental contention is that § 924(c) is inapplicable where the underlying federal felony itself contains a sentencing enhancement provision for use of a firearm. The contention is not that Busic has been punished twice for the single use of a single firearm. The contention is that § 924(c) cannot be applied to underlying felonies such as assaults on Federal officers or process servers, armed robberies of the mail or banks, and various other Federal felonies which contain sentencing enhancement provisions. Under this formulation, the distinction between "using" and "carrying" and the number of weapons or the identity of weapons in given counts, are irrelevant.

As noted in the initial briefs, the legislative history of § 924(c), particularly the unmistakable remarks of the sponsor, Representative Poff, clearly support petitioner's position. Moreover, this Court's language and reasoning in Simpson v. United States, 425 U.S. 6 (1978), needed no additions and was quoted verbatim in petitioner's brief.

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[1]The maximum imprisonment on each of the two counts which Busic could have received for assault without a deadly weapon was 3 years; the maximum imprisonment for use of a deadly or dangerous weapon in each assault was 10 years, 18 U.S.C. § 111. Busic received concurrent sentences of imprisonment for 5 years on Counts 6 and 7.

Representative Poff said:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies. 114 Cong. Rec. 22231 (1968) at 22232.

The Government makes several lengthy arguments regarding the legislative history and the reasonable construction of the statute. Giving full weight to the Government's position, at best, there is an ambiguity. Normally, in criminal cases, this Court tends to resolve such ambiguities in favor of lenity. Simpson v. United States, 435 U.S. 6 (1978); Gore v. United States, 357 U.S. 386 (1958); Callanan v. United States, 364 U.S. 587, 596; Ladner v. United States, 358 U.S. 169 (1958); Bell v. United States, 349 U.S. 81, 84. However, even the finding of an ambiguity would require this Court to ignore the statement of the statute's sponsor and to cut back on its own position in Simpson.

II.
PETITIONER CANNOT BE RESENTENCED UNDER ANY COUNTS OF THE INDICTMENT.

The Government also contends that this case should be remanded for resentencing in the event that petitioner's positions are upheld. The contention is that petitioner should be resentenced on the § 111 counts (counts 6 and 7) but that the total sentence may not exceed the total sentence previously imposed (30 years total; 20 years on Count 18, consecutive to

the 10 years imposed on other counts).

Preliminarily, it should be noted that the sentence already requires modification of at least ten years because of a recent action in the District Court vacating an earlier conviction for violation of 924(c). Thus, Busic cannot be treated as a repeat offender under § 924(c) and the maximum imprisonment thereunder is 10 years. This is discussed in petitioner LaRocca's reply brief, footnote 17, page .

Petitioner Busic joins in the contentions of LaRocca that the requested relief must be denied because: the Government failed to cross-petition or to otherwise preserve the issue, the resentencing would be contrary to Rule 35 of the Federal Rules of Criminal Procedure, the Due Process clause and the Double Jeopardy clause of the United States Constitution.

Petitioners are not here challenging any conviction or sentence except for the sentence under 924(c) (as to Busic, Count 18). In this Court there is no question raised as to the validity of the convictions or sentence under any other count including the assault counts. Therefore, except as to the questions raised on this appeal by the petitioners as to the single count, all other aspects of the case have been resolved.

It should also be noted that in the District Court and in the Court of Appeals, numerous legal issues were raised by both petitioners challenging the validity of their convictions under the assault and other counts. Because of the concurrent nature of the sentences imposed by the Court

and other factors, a number of serious and potentially valid appellate grounds were abandoned because such contentions seemed to have no effect. Such contentions include the scope of the Pinkerton rule and the sufficiency of the Court's instructions on this issue.[2]

If the Government's request is followed, in multiple count indictments, it would be difficult for appellants to limit issues or to abandon issues because of the possibility that otherwise closed counts on which probationary or concurrent sentences were imposed could provide the basis for resentencing if there was prosecution error as to other counts. The extent and unfairness of the resulting burdens to litigants and to the courts should be obvious.

It is respectfully submitted that there is no precedent to vacate the sentence on any count of this indictment other than the counts which are challenged by the petitioners. All that has happened here is that the Court's sentencing expectations as to the validity of the sentence under 924(c) may not be correct. This seems to be the other side of the coin from the situation which confronted this Court in U.S. v. Addonizio, 442 U.S. 178 (1979). In that case, the court had expected more lenient parole consideration

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[2]Under the Court's instructions to the jury, Busic could be convicted of assault if LaRocca's assaults were part of the drug conspiracy in which both were involved and if LaRocca's acts were foreseeable. The jury apparently had trouble with this issue because they asked for further guidance on the premise that Busic had not been personally involved in the assaults. See Pinkerton v. United States, 328 U.S. 640 (1946).

for a sentenced defendant. It was held that these disappointed expectations did not provide a basis for collateral relief. The only substantial difference here is that the court expected that all other sentences were valid and the total imprisonment would be longer, rather than shorter as in Addonizio.

CONCLUSION

For the reasons stated in this reply brief and all other briefs submitted on behalf of both petitioners, it is hereby requested that this Honorable Court vacate petitioner Michael M. Busic's conviction under Count 18.

Respectfully submitted,

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February, 1980

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